11434

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/LSC/2015/0071
Property	:	3, Burlington Lodge, 89 Victoria Road South, Southsea PO5 2BU
Applicant	:	Mr and Mrs Said
Representative	:	
Respondent	:	89 Victoria Road South Limited
Representative	:	Mr Berry, secretary of the Respondent company and lessee and Mrs Berry, Chairman of the Respondent company and lessee
Type of Application	:	Service and administration charges
Tribunal Member(s)	:	Judge D. Agnew Mr D. Banfield FRICS
Date and venue of CMH	:	
Date of Decision	:	30th August 2016

DETERMINATION

Background

1. On 21st September 2015 District Judge Ackroyd in the County Court at Portsmouth in claim number B4QZ269R transferred three matters for determination by the Tribunal. They were:-

   a. whether the Defendant company acted in accordance with the terms of the lease in respect of Flat 3 Burlington Lodge, 89 Victoria Road South, Southsea by not carrying out repairs to the roof of the same when requested by the Claimant

   b. whether the said repairs were necessary, completed to a satisfactory standard and at acceptable cost

   c. whether the Defendant company complied with s21 and 22 of the Landlord and Tenant Act 1985 in respect of the service charges for the years ending December 2012 and 2013.

2. The Tribunal directed that a Case Management Hearing take place and this duly occurred on 6th January 2016 at the Tribunal's offices in Chichester. Mr and Mrs Said appeared in person and the Respondent was represented by Mr and Mrs Berry. Mr Berry is the company secretary and Mrs Berry is a Director and Chairman of the Respondent company.

3. The parties agreed that the reference in the transfer order to the service charge years ending December 2012 and 2013 should be December 2013 and December 2014.

4. The Tribunal directed that, with respect to the District Judge, the Tribunal does not have jurisdiction to determine the issues at a. and b. in paragraph 1 above. The issue in paragraph a is as to whether the landlord has been in breach of the repairing covenant in the Applicants' lease. Whilst section 168 of the Commonhold and Leasehold Reform Act 2002 gives the Tribunal jurisdiction to determine whether a tenant is in breach of covenant there is no similar provision giving the Tribunal jurisdiction to determine whether a landlord is in breach of covenant. Issue b. in paragraph 1, is concerned with determining what damages may be payable by the landlord to the tenant if the landlord is found to be in breach of covenant. Had the roof repair been carried out by the landlord seeking to recover the cost from the tenant then the Tribunal would have had jurisdiction to determine the matter under section 27A of the Landlord and Tenant Act 1985 ("the Act") but again the Tribunal does not have jurisdiction to determine the damages that might be payable for a landlord's breach of covenant.

5. The parties agreed that the Tribunal should determine the disputed service charges for 2013 and 2014 (not 2012 and 2013 as stated in error in the order transferring the matter to the Tribunal) under section 27A

of the Act even though that provision is not specifically referred to in issue b. in paragraph 1 above and also to determine the payability of and reasonableness of the "administration" cost of £250 referred to in the Counterclaim in the County Court proceedings.

6. At the Case Management Hearing the Applicants accepted that they did not dispute any of the 2013 service charges up to the date when the former managing agents, Rayners, ceased to act on 31st October 2014.

7. The Tribunal issued directions for this matter to be prepared for hearing. Difficulties were encountered in the parties complying with the service of documents for which each party blamed the other. Such was the distrust between the parties that the Tribunal resorted to the highly unusual step of directing that documents to be provided to the other party were to be delivered to the Tribunal office to be picked up by the recipient.

8. The case came before the Tribunal for hearing at the Tribunal's offices in Chichester on 10th August 2016. Mr and Mrs Said attended in person and Mr and Mrs Berry appeared again to represent the Respondent company.

The Inspection

9. Burlington Lodge is a purpose-built block of flats in a residential part of Southsea but very close to shops and local amenities and to the seafront in Southsea. The Applicants' lease is dated the 15th April 1969 and the lessor was a building company, Waldron and Son (Builders) Limited, and no doubt they built the block as the design and style of the building is typical of the 1960's. The main building is basically a square box-shape of brick with a flat roof. There are two flats on each of the three storeys. The windows are plastic upvc units. There is a small garden to the front of the block which is mainly laid to grass with some shrubs and hedging. A concrete driveway leads, under an archway or tunnel to the rear of the building. There are 7 garages to the rear of the building with metal up-and-over doors and flat roofs. Situated between the rear of the main block and the garages is Flat 3 of which the Applicants are lessees. This comprises a single storey building, now completely detached from the main block. The flat roof to flat 3 is covered by felt and bitumen over a timber base. The edges of this timber base are exposed in places where there is no flashing or plastic fascia covering it. The roof covering appears to have been poorly finished and is in such a condition that driving rain could easily penetrate behind the external covering. Patio doors lead from Flat 3 into a small grassed area with shrubs. At the time of the Inspection this area was almost completely shut off from the rest of the rear access/garage area by two large cars giving the impression that this area belonged to Flat 3 although on the lease plan this is a communal area. One parking space is marked out on the ground at the edge of this area and this, according to the Applicants' lease is part of the demise to the Applicants.

10. Burlington Lodge appeared to be in reasonable condition structurally although there was evidence of some damp penetration and cracking to plasterwork on the top floor at the rear of the communal hall. The concrete driveway was also in a poor condition. The interior common parts of the main block were in need of decoration and the thermoplastic tiles in the hallways and stairways had either been removed in places or had lifted away from the concrete floor. The rubber nosings to the stair treads were also missing in places and the whole of the noses require replacement. The fire alarm system and emergency lighting appeared, however, to be fairly new.

11. As it featured in the evidence, the Tribunal noted the CCTV cameras and the Tribunal was shown the meter cupboard where the electricity supply to the CCTV system is said to be supplied from.

The relevant law

12. *By section 27A(4) of the Landlord and Tenant Act 1985 ("the Act) an application may be made to a [First-tier Tribunal (Property Chamber)] for a determination as to 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.

13. By section 19 of the Act service charges are only payable to the extent that they are reasonably incurred: in other words, that the amount is reasonable.

14. By section 48(1) of the Landlord and Tenant Act 1987:-
    "A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant and by subsection (2) of that section:-
    "Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall..... be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

15. By section 21B(1) of the Landlord and Tenant Act 1985:-
    "A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges."
    There is a presecribed form of notice specified in the Service Charges Summary of Rights and Obligations....)(England) Regulations 2007 (SI 2007/1257).

The relevant lease clauses

16. By clause 3(viii) of the Applicant's lease the tenant covenants as follows:-

"At all times during the said term to pay and contribute on demand one equal ninth part of the costs expenses outgoings and matters referred to in the Schedule hereto as certified by the Landlord's surveyors, which certificate shall be final and binding on the parties hereto Provided that the tenants shall pay on demand on account of the moneys payable pursuant to this clause a sum not exceeding Thirty pounds per annum to be paid by yearly payments in advance on the Twenty-fifth day of December in every year.....to be applied generally by the Landlord in or towards the said costs expenses and outgoings or to be paid into a reserve fund to be held by the Landlord and applied as it thinks fit in the discharge of the said costs expenses and outgoings and the Tenants shall be given credit for any such payments on account in settling the amount due from the Tenants under this clause."

17. The Schedule referred to in clause 3(viii) of the lease reads as follows:

"1. The expense of maintaining repairing redecorating cleaning renewing and replacing as the Landlord thinks fit:-

- *The roof and external walls and other main structure of the Building so far as the tenants of the flats are not liable in respect thereof*
- *Not relevant*
- *The common doors and door locks hall entrances passages landings paved and grassed areas and staircases of the building and the refuse chamber and meter cupboard on the ground floor*
- *Not relevant*

2. *The cost of cleaning and lighting the said halls entrances landings and staircases and maintaining the step at the entrances of the building*
3. *The cost for the upkeep and maintenance by the Landlord of the entrances gates drives footpaths concrete hardstanding and the gardens and grounds in good state of repair and cultivation*
4. *The cost of decorating the exterior of the Building*
5. *The cost incurred by the Landlord in the employment by it of a firm of Estate Agents and Surveyors and/or Accountant to mange the Building on its behalf*
6. *The cost of insuring the Building.....*
7. *The water rate (if any) incurred in respect of the cleaning of the common parts of the Building and the watering of the gardens and*

grounds and also for the supply of water to the stand pipe in the yard adjoining the said garages."

The hearing

18. The Tribunal first went through the relevant parts of the lease to confirm that both parties were familiar with the terms of the contract that the Tribunal was required to apply when deciding the case. Both parties confirmed that they understood the provisions.

19. Next, the Tribunal asked Mrs Berry to confirm which of the documents in the hearing bundle she was relying on constituting the demands for payment of service charges and the service charge accounts upon which the demands were based.

20. Mrs Berry said that due to the difficulties that the Respondent experienced in obtaining bank statements, cheque books and invoices and receipts from Mr Said when he ceased to be a Director of the Applicant company it had been felt that the company was not in a position to confirm any formal accounts for 2013 as being accurate. The then managing agents, Rayners, issued the on-account demands for 2013 and the Respondent was unable to obtain copies of those demands. Mr Said, however, confirmed what he had said at the Case Management Hearing that he did not challenge any of Rayners' figures up to the end of October 2013. This included a Statement of Account (page 18 of Tab 9 in File 4 of the hearing bundle) which showed service charges of £450 due on both 1st January 2013 and 1st July 2013. Mr Said agreed that for a number of years, including when he was a Director and responsible for the accounts, it was the custom and practice of the Applicant to demand £450 twice per year on account of service charge expenditure. He also agreed the said Statement of Account to which reference will be made in some detail hereafter. Furthermore, as he and another Director had charge of expenditure and the bank account up to March 2014 (notwithstanding that he had ceased to be a Director on 14th January 2014!) he agreed that he could hardly challenge expenditure for the whole of 2013.

The Tribunal's determination re the on-account charges for 2013

21. Although the Tribunal has not had sight of the demands for 2013, the Applicants do not challenge that valid demands were made on two occasions for £450 each and so the Tribunal is satisfied that a total of £900 was properly claimed on account of service charges for that year. It is true that the lease provides that on-account payments shall be limited to £30 but the Tribunal is satisfied that by custom and practice over the years this provision has been varied to £900 per annum by all the lessees including the Applicants who operated on the same basis when Mr Said was a Director and responsible for the accounts.

22. The service charge statement produced by Rayners, which the Applicant accepted, shows that as at 1/10/13, when their retainer

ceased, the Applicants owed £493.78 in service charges and other amounts due. There is then an entry for 6th December 2013 which states "Payment of service charge (Mr Said and...£493.78)." On the face of it, this implies that Mr Said paid £493.78 on 6th December 2013 and that thereafter his service charge account was clear and he owed nothing. Indeed that is what Mr Said claimed was the situation. He said he paid it to Rayners by credit card. He has no proof of payment, however, because he says that his records have been destroyed when he suffered water ingress to his flat and he cannot get copies of his statements from the credit card company because he no longer has credit cards and, in any event, the company no longer exists.

23. Mrs Berry disputes that the Applicants have paid the aforesaid £493.78. She says that the item described as a payment by Mr Said on 6th December 2013 was simply a way of Rayners closing the account. She pointed to a letter to her from Rayners dated 25th May 2015 which stated:
"We confirm your interpretation of the position is correct, namely that payments received on 6th December 2013 totalling £3,464.54 were not received from the individual lessees but were an apportionment of the net balance of service charge in hand . In fact these lessees were in arrears of service charge at the time of the handover."

24. The question is, therefore, whether the Applicants have, as they say, paid the £493.78 on 6th December 2013 or is that amount still owed? On a balance of probabilities the Tribunal finds that this sum was not paid by the Applicants on 6th December 2013 and it remains outstanding. It has to be said that the last line of the statement of account produced by Rayners and their letter of 25th May 2015 are confusing, misleading and far from clear. However, the Tribunal finds it unbelievable that the Applicants would have paid nearly £500 to a company who had ceased being the managing agents about five weeks previously when Mr Said had access to the landlord bank account and was still a director of the landlord company at this time. Surely, he would have paid the money directly into the bank account. Furthermore, it is stretching credulity to accept that so much misfortune had befallen the Applicant that for one reason after another he was unable to produce evidence of payment. Accordingly the Tribunal finds that the Applicants still owe £493.78 by way of on account service charges for 2013.

The Applicants' challenges to the on-account demands for 2014

25. The service charge demands for 2014 are all on-account demands. There are, in the hearing bundle two versions of the demand for the period 1/1/14 to 30/6/14. In File 2 the demand, which is for £450, is dated 20th May 2014 and states that all payments should be made to 89 Victoria Road South Limited. The other version, again for £450, is dated 25th May 2014 and states that payments should be made to VRS Limited. The Applicants' point is that the landlord is not VRS Limited but is 89 Victoria Road South Limited and so this demand is defective

because it does not comply with section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act") which provides that any demand for rent or other sums payable to a landlord under the terms of a lease must contain the name and address of the landlord. Failure to do so means that the amount demanded is not due until that information is supplied. The same objection applies to the demands for on-account payment for the period 1/7/14 to 30/9/14 for £225 and for the demand for £225 for the period 1/10/14 to 30/12/14. In the case of these two demands there were no versions in the hearing bundle which contained the correct name of the landlord. In each case the address for payments to be made is 2, Burlington Lodge. The Applicants say that this is the address of a Director, not the company's address and so that too does not comply with section 47 of the 1987 Act. In every case the Applicants say that no summary of rights and obligations accompanied the demands for on-account payments contrary to section 21B of the 1985 Act. Finally, they say that the two demands for the second half of 2014 were for only three months and not six.

The Tribunal's determination re the on-account demands for 2014

26. The demand, a copy of which is in File 2 of the hearing bundle, for £450 for the first half of 2014 does contain the correct name and the address at that time of the registered office of the landlord company. That demand is, therefore, not invalid. However, the remaining two demands covering the second half of 2014 do not contain the correct name of the landlord. Although it is a technicality, the Tribunal finds that this means that these two demands do not satisfy that requirements of section 47 of the Act. Consequently, until such time as a demand containing the correct name and address of the landlord is sent to the Applicants the amount sought by way of service charges on account are not payable. The situation is retrievable by the Respondent by serving a correct invoice or invoices for the relevant period but it does mean, as far as the County Court proceedings is concerned that at the date of the counterclaim the sum of £450 for the second half of 2014 was not due and owing by the Applicants to the Respondent (and is still not due and owing). The Tribunal is not persuaded that the rendering of two invoices each covering a three month period rather than one invoice covering six months invalidated the invoices but if the Respondent is intending to re-issue invoices to rectify the defects it may be safer to issue one invoice for a six month period rather than two invoices for three months each.

27. With regard to the allegation that no summary of rights and obligations was served with the service charge demands there was a direct conflict of evidence, Mrs Berry asserting that a summary had been sent with each demand and the Applicants denying this. It was clear that the requirement for such a summary was known about by the Respondent and copies of the summaries said to have been sent were included in the section of the bundle containing the Applicant's own documents. On a balance of probabilities, therefore, the Tribunal finds that summaries of rights and obligations were served with the service

charge demands. It is necessary, however, for any re-issued demands for the second half of 2014 to be accompanied by such a summary so any doubt that there may be as to whether a summary was included with the original demands should be resolved when the new invoices are served. It would be prudent for the Respondent to have an independent third party witness the content of any new notices served as well as the fact of service of the demands to avoid any future allegations of this sort being possible.

In summary, therefore, in respect of the matters referred to the Tribunal by the County Court judge (as varied by the parties as to the years in question as agreed between the parties) the Tribunal determines that as at the commencement of 2013 the Applicants owed the sum of £493.78 by way of service and other charges and that this sum is still owed by the Applicants. A further sum of £450 is owed by the Applicants to the Respondent for the on-account service charges for the first half of 2014. The Applicants do not yet owe the £450 demanded in two three-monthly instalments for the on-account service charge for the second half of 2014 as the demands were defective in not containing the proper name of the landlord, contrary to section 47 of the Act. This defect is curable by the service of a fully compliant demand.

28. In the transfer order the County Court judge raises the question as to whether the demands complied with section 22 as well as section 21 of the Act. Section 22 concerns the duty of the landlord to afford the tenant reasonable facilities for the inspection of accounts, receipts and other documents. The Applicants alleged that they had requested such facilities but they were denied. The Respondents asserted that they had offered reasonable facilities for the inspection of such documents on numerous occasions but that they had not been taken up by the Applicants. The Tribunal did not make any determination in respect of these matters. That is because any failure to comply with section 22 is a matter for complaint to a Magistrates' Court as non-compliance is a criminal offence. Even if there had been non-compliance that would not be a matter affecting the payability of the relevant service charges.

29. The above determination therefore deals with the matters that the County Court judge asked the Tribunal to determine and which are within the Tribunal's jurisdiction. The end of year service charge accounts for 2014 have, however, been completed and served upon the Applicants and the parties have made their submissions to the Tribunal in respect of each item of expenditure. For the benefit of the parties and in an effort to avoid the necessity of either party having to make a fresh application to the Tribunal to decide the reasonableness of the service charges actually expended in that year the Tribunal has proceeded to consider the evidence produced by the parties in respect thereof. The Tribunal has considered the evidence in detail even though the findings in respect of each item of expenditure is only briefly set out below. The

amount claimed, the amount allowed and a brief reason for the decision is set out below.

30. **Insurance premium**: £1208.50 claimed. Amount agreed by lessee.
Directors/officers insurance: £316.50 claimed. Tribunal determines that this is a company expense, not properly a service charge item. It may be claimable by the company from its shareholders but that is not a matter within the Tribunal's jurisdiction to determine.
Communal cleaning: £395.51 claimed. Agreed by Applicant after discussion.
Gardening: £751 claimed. The Tribunal finds that this is in line with previous years' expenditure on gardening. No evidence of inadequate work (for example in the form of photographs) was supplied. The Tribunal finds £751 reasonable.
Electricity: £198.79 claimed. Agreed after discussion.
Alarm service: £54 claimed.The Applicants claimed that the charge was unnecessary. The triggered alarm could have been switched off for free. However, Mr Said said that although the alarm had been going for about two hours he did not want to get involved although he had the means of access to the communal area where the alarm control was situated. In all the circumstances the Tribunal finds that it was reasonable for the Respondent to call out a specialist company to investigate and de-activate the alarm.
New keys: £48.70 claimed. Mr Said's complaint was that 19 keys were paid for but he only received one for the back door. This was disputed by Mr Berry.The Tribunal finds that it was reasonable to have one key for the front door and one key for the back to be cut for each of the nine flats and have one spare. The Tribunal finds that the expenditure was reasonably incurred and was reasonable in amount.
Miscellaneous: £10.62 claimed. This was for stationery required in managing the building (for example lever arch files, staples etc). The Tribunal determines that there is no provision in the lease for the landlord to recover its own costs of management as opposed to the costs of employing a managing agent and so this item is not recoverable as a service charge item. It may, however, be recoverable from shareholders of the landlord company as a company expense but, as for Directors'/officers' insurance this is not within the Tribunal's jurisdiction to determine.
Repairs/replacements: £462.32 claimed. These largely related to repairs to the doors to the communal area of the main block following damage by vandalism. The Applicants considered the cost too high. Their concern that a friend of one of the Directors may have caused additional damage was mere speculation. The Tribunal considers the amount charged to have been reasonably incurred and reasonable in amount.
CCTV system: £1022.36 claimed. The Applicants considered the expenditure unnecessary. It was not an original feature of the building. It is therefore an improvement. If it has been installed for security reasons a security gate under the archway to the rear of the building would be more effective. Mrs Berry explained that the Directors thought it necessary, on advice from the police, as there had been a

number of incidents involving the Applicants. It has been useful in providing evidence on three occasions. The Tribunal determines that there is no provision in the lease allowing the Respondent to recover the cost of expenditure on improvements and as such a system was not a feature of the building when the leases were entered into this is an improvement. Again, this may be something that is recoverable from the shareholders as a company expense but that is outwith the Tribunal's jurisdiction.

Admin expenses: Bank charges of £172.96 and telephone/stationery/postage of £331.71, total £504.67. These are the landlord's own costs of managing the building. As already noted, the lease does not allow for the landlord's own costs to be recovered as a service charge albeit that the company might possibly be able to recover it from its shareholders. These amounts are therefore not properly claimable by the Respondent as service charge items as opposed, possibly, to a claim against the Applicants as shareholders.

31. The upshot of the foregoing is that of the service charge accounts for 2014 this Tribunal would disallow £1874.15 some or all of which may be claimable from the Applicants as shareholders in the Respondent company but in respect of which this Tribunal has no jurisdiction to make a determination.

Costs

32. The costs of the County Court proceedings and interest claimed are matters for the County Court to determine. In addition, however, the Respondent has asked the Tribunal to order the Applicants to pay costs of £107.64 incurred in preparing the bundles for the Tribunal hearing. This application is made under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. The Tribunal has power to order such costs only where a party to proceedings has acted unreasonably in bringing, defending or conducting proceedings. In the case of Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC) the Upper Tribunal considered at length the question as to what conduct constitutes unreasonable conduct for the purpose of Rule 13. It decided that costs should not ordinarily be awarded where a party has (a) not prepared properly for a hearing, (b) not adduced proper evidence in support of their case, (c) failed to state their case clearly or (d) sought a wholly unrealistic or unachievable outcome. The fact that a party is unrepresented must be taken into account and a costs order will not always be appropriate where unreasonable conduct is found.

33. In this case Mrs Berry contended that in not taking up the Landlord's offer to inspect invoices the Applicants had not carried out "due diligence. The Applicants had brought the case but it was the landlord that had to bear the cost of preparing the bundle which, she claimed, was not normally the case. She asked for an order re-imbursing the landlord the cost of having to prepare the hearing bundle.

34. The Applicant denied that he had been unreasonable. He claimed to have attempted to take up the offer of inspection of documents even travelling to London for the purpose but he had got the procedure slightly wrong.

35. The Tribunal finds that the Applicant's conduct has not amounted to unreasonable conduct within the meaning of that term as explained in the Willow Court case. The bar is set very high for a party to establish unreasonable conduct in the context of this Tribunal which is generally a no-cost forum for resolving disputes. It was in fact the Tribunal that decided that the Respondent should prepare the hearing bundle as it judged that this was more likely to be done in such a way that would be helpful to the Tribunal and the parties and thus save much time and effort at the hearing with a satisfactory bundle than was likely to be produced by the Applicant. It is accepted that it is usually the Claimant in Court proceedings that is required to produce the bundle but there is no corresponding practice in the Tribunal whose rules allow it to regulate its own procedure. Accordingly, the Tribunal makes no order as to costs of the Tribunal proceedings in this case.

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.

Dated the 30th day of August 2016
Judge D. Agnew