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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/18UB/LIS/2014/0035
Property	:	10 Western Court Sidmouth Devon EX10 8QS
Applicant	:	Western Court (Sidmouth) Residents Association Limited
Representative	:	Christopher Brookes (Counsel)
Respondent	:	Jean Dixon
Representative	:	David Dixon
Type of Application	:	Transfer from County Court – Section 27A and Sections 19 Landlord and Tenant Act 1985 (the Act) Liability to pay and reasonableness of service charges
Tribunal Members	:	Judge Cindy A. Rai William H. Gater FRICS ACI Arb (Chartered Surveyor) Timothy N. Shobrook BSc FRICS (Chartered Surveyor)
Date and venue of Hearing	:	09 December 2014 Exeter Magistrates Court Heavitree Road Exeter EX1 2LS
Date of Decision	:	7 January 2015

DECISION

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1. The Tribunal determines that the following service charge is payable by the Respondent for the years 2010 – 2014.

2010 -2011	£ 497.65	[Part year]
2011 -2012	£1,250.36	
2012-2013	£1,821.03	
2013-2014	£ 361.34	[Part year]
Total	£3,930.38	

Taking into account the amount which the Respondent has already paid of £700 plus the credit of £2,696.38 in respect of her share of the sinking fund which together total £3,696.38 the balance of the service charge payable and due to the Applicant in respect of its claim is £534.

2. The reasons for its decision are set out below.

Background

3. This determination was made following the transfer of a claim dated 19 December 2013 (the County Court Claim) made by the Applicant as Claimant in the Telford County Court to the First Tier Tribunal Property Chamber.

4. An Order made by District Judge Collins in the Exeter County Court on 31 March 2014:-

   a. Stayed the County Court Claim
   b. Referred the issues as to whether a service charge is payable, whether it was reasonable and the amount to paid, the date and manner of payment and by whom and to whom to the Leasehold Valuation Tribunal.

5. The Leasehold Valuation Tribunal was abolished on 1 July 2013 and its jurisdiction transferred to the First Tier Tribunal Property Chamber. [Transfer of Tribunal Functions Order 2-13 SI2013/1036].

6. Directions dated 11 August 2014 made by Judge Wilson identified the issues in dispute and set down a timetable for statements of the parties' cases and the preparation of an agreed bundle to be produced and sent to the Tribunal and the other party to enable the Tribunal to determine the application without a hearing unless either party objected.

7. Following receipt of the bundle of documents from the Applicant the Tribunal notified the parties that it required a hearing prior to making a determination.

8. The Respondent is the current owner of the Property pursuant to a lease dated 23 August 2001 for a term of 999 years made between the Applicant (1) Ann Birtchnell (2), (the Lease). The Respondent purchased the property in 2003.

9. The Property was originally demised in 1979 for a term of 99 years (the Original Lease), but the Original Lease was surrendered and re-granted by the Lease.

10. The Respondent is liable to contribute a 1/33 share towards the services which the Applicant is obliged to provide. The obligation (contained in Clause 2(12) of the Original Lease was to pay to the Landlord 1/34 of all monies expended by the Landlord in complying with the covenants contained in sub-clauses of Clause 3 (i) and Clause 3(ii).

11. A Deed of Variation of the Original Lease dated 8 July 1982 altered the tenant's obligation to contribute a 1/34 share to an obligation to contribute a 1/33 share. Apparently fewer flats were built than originally intended.

Inspection

12. Prior to the Hearing on 9 December 2014 the Tribunal members inspected the buildings collectively known as Western Court Sidmouth Devon (the Buildings), which consist of three blocks of flats. A lower ground floor containing car parking is located under two of the blocks. There is lift access from the car park to the flats and the other block also contains a lift. The Tribunal were accompanied by Rob Cann Property Manager and Spencer Jarrett, Director and Senior Property Manager both employed by Hillsdon Management (the Managing Agents).

13. The Tribunal members were told that there are four lifts one serving the two storey block and three serving the three storey blocks. It inspected one of the lifts and noted that its capacity was for six persons and it appeared to be original to the construction. It was told that the buildings which are purpose built were constructed in the late 1970's.

Hearing

14. On the day before the Hearing the Applicant's solicitor had sent a skeleton argument and copies of the various cases and other authorities referred to in it by email to the Tribunal Office. It was not clear if these documents had also been sent to the Respondent but further copies were distributed on behalf of the Applicant prior to the Hearing

15. As not all of the Tribunal Members had seen the skeleton argument the Hearing was delayed to enable the Tribunal and Mr Dixon to read the skeleton argument. At the start of the Hearing Mr Dixon explained that although he had read the skeleton argument he did not entirely understand it and given that he had an inadequate opportunity to obtain advice on its content and wished to reserve his right to do so since the Respondent had not taken legal advice.

16. The Tribunal explained that it would assist him in relation to clarifying what was contained in the skeleton and ask that the Applicant's Representative, Mr Brookes, clarify everything which he had not initially followed or understood.

17. The Tribunal was able to establish from submissions made by both the Applicant's and the Respondent's Representatives that:-

    a. The Applicant is the freeholder of the Buildings.

    b. The Respondent accepts that she is liable to pay service charges to the Applicant and that she is not suggesting that the services provided are not reasonable or not carried out to a reasonable standard.

    c. The Respondent was, and remains, unwilling to contribute to the Reserve Fund retained by the Applicant which has increased during each year in which she has owned the Property.

18. The Tribunal was told by Mr Dixon that following an enquiry made by the Respondent of the Managing Agent she was told that she would not recover her share of the Reserve Fund if she sold her flat and furthermore the accumulated fund would not increase the capital value of her flat on sale.

19. Subsequently Mr Dixon had carefully read the Lease and discovered that it contained no provision which enabled the Applicant to demand payment of service charges in advance of it incurring expenditure or to accumulate and retain a reserve fund to defray the costs of future expenditure.

20. The Respondent is concerned that in making service charge payments, some of which are being put into the reserve fund, she was contributing towards future expenditure on the Buildings from which she will derive neither an actual or financial benefit. For those reasons and also because she is aware that the reserve fund had grown substantially since she bought the Property she stopped making regular monthly service charge payments which until then she had paid to the Applicant by automatic bank transfers.

21. Mr Dixon also told the Tribunal that the Applicant had not issued demands for payment and furthermore that he had discovered that there was a statutory obligation for the Applicant to issue demands containing a summary of the rights and obligation of the leaseholders.

22. He said that on the date of the issue of the County Court claim no demands had been received to the Respondent. Furthermore she was not in arrears with her service charge at that date.

23. Subsequently the claim for administration charges (referred to in the County Court Claim) had been withdrawn and the Applicant conceded that the Respondent had made payments totalling £700 and credited the Respondents service charge account in respect of her share of the Reserve Fund.

24. He referred the Tribunal to an email dated 17 September 2014 sent from or on behalf of Rob Cann Property Manager in which he said ... "as you are aware, demands have historically not been served monthly. In any event, we note that you have made part payments previously and have no records of you having objected to the demands not being sent monthly. Furthermore, as you are aware, the demands have been re-served so you will have copies of the same." [Page 11 of the bundle].

25. The other concern identified by Mr Dixon at the beginning of the Hearing was his contention that it was not fair that those leaseholders who owned larger two bedroom flats should be liable for the same percentage of the service charge as the Respondent whose property is a one bedroom flat. He also inferred, without referring the Tribunal or the Applicant to any evidence, that other leaseholders had been granted concessions in respect of their service charges based on the comparable size of their properties.

26. The Tribunal explained that it was not within its jurisdiction to vary the percentage contribution of the service charge that the Respondent was liable to pay but it may be possible for the Respondent to make an application for variation of her lease if her complaint came within the variation provisions contained in sections 35 – 37 of the Landlord and Tenant Act 1987. In the case before it the Tribunal could only determine the amount payable by the Respondent in accordance with and in reliance upon the provisions of the Lease.

27. Following the preliminary discussion it was clear and agreed between the parties that the following issues remain unresolved:-

    a. Whether at the date of the County Court claim the Respondent was in arrears with the service charges payable in respect of the Property

    b. Whether the Respondent was liable to pay the service charges in advance of service charge demands being sent to her

    c. What arrears of service charge in respect the Property, if any, are due at the date of the Hearing

28. The Tribunal explained to both parties that it had no jurisdiction to consider the claim for interest and costs made in the County Court which would be for that Court to determine following the Tribunal's determination on that part of the County Court Claim which had been transferred to it.

29. The Applicant's Representative (who was not accompanied by anyone else), attempted to obtain telephone instructions, in particular as to whether it was the Applicant's case that any service charge demands had been issued prior to 23 July 2014, (which is the date on all of the copy demands contained at pages 50 – 98 of the bundle), but was unable to do so before the end of the Hearing. He confirmed that he would arrange for this information to be sent to the Tribunal and the Respondent on or before 23 December 2014.

The Applicant's Case

30. Prior to the clarification of the issues Mr Brookes suggested that, by virtue of the fact that the Respondent had made previous payments of her service charges to the Applicant, irrespective of the contractual obligations in the Lease, she was stopped from seeking to rely upon the wording of the Lease to justify the withdrawal of regular payment although he appeared to concede that she may have been able to change her position by giving notice.

31. He also referred to an Annual General Meeting of the Company in 2008 at which a unanimous vote had been taken by its members, (which included a vote made on behalf of the Respondent by Mr Dixon), to make payments in advance of the costs of services being incurred.

32. Mr Brookes helpfully explained the concept of estoppel to Mr Dixon.

33. When it became clear that his assumption that service charge demands had been served previously was not substantiated by any evidence, and that the copy email at page 11 of the bundle rather implied the contrary, the Tribunal requested that Mr Brookes consider if the Applicant had in fact complied with section 20B(1) of the Act. That clause provided that a tenant is not liable to pay service charges if any of the relevant costs taken into account in determining the charges had been incurred more than 18 months previously subject to section 20B(2), which effectively reverses that presumption, if within that 18 month period 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 towards them by payment of the service charge.

34. Mr Brookes suggested that the Respondent would have regularly seen annual accounts and possibly budgeted service charge estimates for subsequent years and been aware what expenses would be incurred and in respect of which service charges would be due regardless of whether or not demands were issued.

35. Mr Dixon confirmed that this was the case and said that draft accounts had been produced each year, which confirmation was consistent with a June Annual General Meeting, and the service charge year shown by those copies of the Applicant's accounts contained in the bundle.

36. Mr Brookes suggested that following the Respondent's clarification that the failure to make regular service charge payments was not based upon any issue regarding liability but rather on account of "a feeling of unfairness" which he now accepted was outside the jurisdiction of the Tribunal and "a sense of outrage" that the County Court claim was made at a time when the Respondent had not been in arrears with her service charges and that her proper remedy was in relation to the Applicant's claim for interest and costs, which were part of the County Court Claim and not within the Tribunal's jurisdiction.

37. Mr Brookes also mentioned the Applicant's rebuttal of any claim made under section 20C of the Act to which the Applicant's solicitors had referred in a letter contained in the bundle.

The Respondent's Case

38. The issues were as summarised at the commencement of the Hearing. The Respondent was not in arrears with her service charge at the date of the County Court claim.

39. The Respondent accepts liability for payment of the service charges but not that there is any entitlement for the Applicant to take payment in advance of incurring expenditure. Any argument put forward by or on behalf of the Applicant that it would be unable to carry out regular services without receipt of advance service charge payments is not substantiated by examination of the accounts, which show a substantial reserve fund of in excess of £100,000.

40. The Respondent had not received demands for the service payments due and is entitled to receive demands which contain or are accompanied by a summary of the leaseholder's rights and obligations.

41. The Respondent's representative said that he was unaware of the provisions of section 20(B) of the Act but accepted that the Respondent had been aware that service charge expenditure was estimated annually and that she had received copies of accounts, albeit possibly draft accounts, annually.

Evidence received after the Hearing

42. Copies of seven invoices for monthly service charges from Hillsdon Management, addressed to the Respondent at the Property and dated 1/07/2014 – 1/01/2011 + an invoice dated 1/04/2013 were received by the Tribunal office on 22 December 2014 with a letter from the Applicant's solicitor dated 18 December 2014 with copies of a Statement of Account and the 2014 Accounts. A copy of the "Service Charges Summary of the Tenant's rights and obligations" was also included but there was nothing to link it to the invoices save that the letter from the Applicant's representative stated that "Hillsdon also advise that these demands were also served with accompanying Summary of Rights".

43. The Respondent wrote to the Tribunal on 24 December 2014, (received 29 December 2014) , in response and confirmed that:-

    a. She had no record of receipt of those demands

    b. She referred to the two demands she had received in her initial defence (B6 of the Bundle) but the Applicant had not included reference to those two demands.

    c. The Applicant has already confirmed that monthly demands were not issued, (her statement at page A11 of the Bundle) in which she said that she had only ever received two demands.

Reasons for the Decision and the Law

44. The only issues requiring determination by this Tribunal are those set out in paragraph 27 above being:-

    a. Whether at the date of the County Court claim the Respondent was in arrears with the service charges payable in respect of the Property

    b. Whether the Respondent was liable to pay the service charges in advance of service charge demands being sent to her

    c. What arrears of service charge in respect the Property, if any, are due at the date of the Hearing

The Arrears Question.

45. The County Court Claim was made on 19 December 2013. At that date the Applicant claimed Arrears and administration charges of £1,785.62. Mr Brookes has set out the amounts due from the Respondent as totalling £968.62. The Applicant apparently concedes that the amount shown in the County Court Claim was inaccurate. Furthermore if demands for the service charges claimed had not been served the Applicant would have failed to comply with Section 21B of the Act which requires that demands for payment of service charges be accompanied by a summary of the rights and obligations of tenants in relation to service charges. Such failure would entitle the tenant to withhold payment until a compliant demand is served. Therefore Mrs Dixon could not have been liable for those service charge arrears itemised in the County Court Claim.

46. Clearly the written evidence of the parties in relation to whether invoices were regularly issued and which invoices had in fact been sent to the Respondent is inconsistent but the Tribunal accepts that the email from Hillsdon dated 17 September 2014, referred to in paragraph 24 above, confirms, as the Respondent suggests, that invoices demanding service charges were not generally issued. It finds it odd that if the invoices now referred to in the Statement of Account had been sent to the Respondent on the dates shown on them; copies were not produced prior to the Hearing or included in the bundles submitted to the County Court. In its view all that the Statement of Account which has now been supplied evidences is that invoices were raised by the Applicant, not that that these were actually sent to the Respondent.

47. The Tribunal had not been afforded any opportunity to test the Applicant's evidence regarding the service of the Summary of the tenant's rights and obligations with any demands sent, as no evidence was provided with the hearing bundle. If it accepts that the demands were sent it would also need to be satisfied that demands were accompanied by the appropriate "Summary". If the demands were sent without the "Summary", the Respondent would have been entitled to withhold payment.

48. The Applicant's evidence regarding the service of demands for all the service charges claimed by it in the County Court Claim is unsatisfactory and the Tribunal cannot therefore conclude that written demands for payment of all of the service charges which the Applicant claims were due from the Respondent were, in fact, sent to her prior to 19 December 2013, (the date of the County Court Claim).

49. Following the issue of the County Court Claim the Applicant conceded that payments of £700 should have been credited to the Respondent's account, (see paragraph 23 above), which suggests that at the date of the issue of the County Court Claim the Applicant's records were either incomplete or inaccurate. Having considered the evidence before it the Tribunal determines that at the date of the County Court Claim the Respondent was not in arrears with her service charges.

The Respondent's liability to pay service charges prior to the Applicant incurring the relevant charges to which these relate.

50. It appears to be accepted by both parties that the Lease does not entitle the Applicant to demand payment of service charges in advance of it incurring relevant costs in relation to the services to which these relate.

51. Therefore for Mrs Dixon to be liable to pay in advance the Tribunal would have to accept there was merit in the estoppel argument put forward by Mr Brookes.

52. Since the Tribunal has already determined that the service charges were not due because of a failure by the Applicant to properly demand them it is not necessary to consider that argument in any detail.

53. It may be useful however to comment that estoppel is an equitable remedy. As Mr Brookes explained, as such it overrides and sits beside the Common Law. However he omitted to explain that a party seeking to rely upon an equitable remedy must be blameless; i.e. it must have done nothing wrong itself and must come to the court with "clean hands". In this case it would clearly be inappropriate to allow the Applicant to rely upon an equitable remedy given its failures to accurately present the arrears at the date of the County Court Claim and demonstrate compliance with the relevant legislation.

Calculation of the arrears due to the Applicant.

54. Mr Dixon has accepted that the Respondent is liable to pay service charges and reluctantly accepted that she currently remains liable for 1/33 of the expenditure incurred in each service charge year.

55. In reliance on the actual service charge expenditure shown in the accounts for each of the disputed years the Tribunal calculates that Mrs Dixon is liable for the following amounts:-

Service charge period	**Expenditure in A's accounts**	**Amount Due**
2010 – 2011 [1.11.10 – 31.03.2011]	1194.36	497.65
2011 – 2012 [1.04.2011 - 31.03.2012]	1250.36	1,250.36
2012 – 2013 [1.04.2012 – 31.03.2013]	1821.03	1,821.03
2013 [1.04.2013 – 21.06.2013]	1445.36	*361.34
		3,930.38

*This is calculated for whole of month of June 2013 on basis that service charge is invoiced for entire month

56. It is accepted by the Applicant that the Respondent be credited with £700 (paid subsequently) + £2,696.38 (reserve fund credit) which two sums total 3,396.38. Therefore deducting this sum from the sum above the amount due from the Respondent is £534.

57. Whilst not the reason for its decision the Tribunal has noted from its examination of the company accounts produced that substantial service charge reserves have been accumulated and that in particular part of the reserve fund appears to relate to an anticipated repair or replacement of the four lifts.

58. No information relating to possible future works or an ongoing consultation regarding the replacement of the lifts has been produced to the Tribunal. In the absence of such information it infers that despite the accumulation of the Reserve Funds there is no planned strategy or timetable for the Applicant to carry out substantial qualifying works and the willingness of the Applicant to credit the Respondent's service charge account with her share of the reserve fund seems to confirm this.

59. Clearly however if works are carried out within the next few years the Respondent's share of the cost of such works would include 1/33 of the entire cost without the benefit of any accumulated reserve.

Judge Cindy A. Rai

Chairman

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 which application must:-

    a. be received by the said office within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

    b. 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

2. If the application is not received within the 28-day time limit, it must include a request for an extension of time and the reason for it 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.