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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LSC/2015/0374**
Property	:	**First Floor Flat, 6 Ashbourne Parade, Finchley Road, London NW11 0AD**
Applicants	:	**(1) Mr P Feldman** **(2) Mr J Freifeld**
Representative	:	**Stock Page Stock**
Respondents	:	**Greyclyde Investments Limited**
Representative	:	**Martyn Gerrard**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**(1) Mr A Vance, Tribunal Judge** **(2) Mrs A Flynn, MA MRICS**
Date of Decision	:	**2 November 2015**

DECISION

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Decisions of the tribunal

1. The tribunal determines that the amount payable by the Applicants (in their 50% share) for the 2015/16 interim service charge year is as follows:

Item	Demanded	Payable
Buildings Insurance	£1,550	£1,062.80
Repairs & Maintenance	£400	£400
Management Fees	£600	£600
Accountancy Fees	£360	£120
Reserve Fund contribution	£1,800	£1,800

2. The tribunal does not make an order under s.20C Landlord & Tenant Act 1985 as there is no provision in the Applicants' lease for the Respondent's costs of these proceedings to be recovered through the service charge.

The application

3. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of the interim service charge payable by them for the 2015/16 service charge year for First Floor Flat, 6 Ashbourne Parade, Finchley Road, London NW11 0AD ("the Flat"). The Flat is one of two residential flats contained in a terraced building on Finchley Road built in the early decades of the 20th century ("the Building"). The ground floor area of the Building is occupied by a clothing retailer.

4. The Applicants hold a long lease of the Flat dated 21 December 1984 entered into between Habitward Limited (1) and Stephen John Moody (2) ("the Lease"). The provisions of the Lease require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the Lease will be referred to below, where appropriate.

5. Numbers in brackets and in bold below refer to pages in the hearing bundle supplied by the Respondent.

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

7. Directions were issued by the tribunal on 27 August 2015. Although both parties were late in complying with some of those directions neither party took issue with this at the tribunal hearing on 26 October 2015. At that hearing the Applicants were represented by Mr John Fowler of Stock Page Stock. Mr Martyn Gerrard, chartered surveyor and director of Martyn Gerrard (the managing agents for the Building) and Mr Roshane Dias, block manager, attended on behalf of the Respondent.

8. Copies of the following documents were handed to the tribunal during the course of the hearing and neither party objected to their late admission in evidence:

    (a) A letter dated 22 September 2015 from Martyn Gerrard to Stock Page Stock; and

    (b) An email from Kruskal Insurance Brokers to David Freifeld of Stock Page Stock dated 12 October 2015 providing an alternative insurance quote for the Building.

9. This Application concerns the budget for the 2015/16 financial year which had been set by the Respondent at £4,710 to be apportioned equally between the long lessees of the first floor and upper floor flats in the Building. That sum was broken down as follows:

Buildings Insurance	£1,550
Repairs & Maintenance	£400
Management Fees	£600
Accountancy Fees	£360
Reserve Fund contribution	£1,800

10. In their Application the Applicants challenged all of those heads of anticipated expenditure. However, by the date of the hearing, and following service of the Respondent's statement of case, the issues in dispute between the parties had been narrowed. Firstly, the Applicants no longer sought to challenge the budgeted cost of repairs and maintenance. Secondly, Mr Gerrard had reviewed the accountancy fee and agreed that as the Lease did not require the provision of certified accounts the cost of this item could be limited to £100 plus VAT, equal to £60 per flat, inclusive of VAT. Mr Fowler confirmed that in light of that concession this head of anticipated expenditure was no longer in dispute.

Buildings Insurance (£1,550)

11. Somewhat unusually, the Respondent has taken out one buildings insurance policy to cover the ground floor commercial premises and a separate policy with the same insurer to cover the First Floor and Upper Floor Flats.

12. Mr Gerrard stated that following complaints from the Applicants regarding the anticipated cost of the buildings insurance policy he contacted the insurance brokers who suggested that the best way to reduce the cost of the premium for the residential flats in the Building was by recalculating the premium based on a reduced reinstatement value for those flats. The original reinstatement value of £351,050 was therefore reduced to £250,000 with the result that the premium payable for the period 1 June 2015 to 31 May 2016 was reduced from £1,492.39 **[28]** by a credit of £429.59 making the revised premium payable £1,062.80 including Insurance Premium Tax ("IPT"). This equates to £531.40 per flat.

The Applicants Case

13. Mr Fowler's contention was that the revised premium was still too high. His evidence was that he used to manage number 9 Ashbourne Parade which is a similar building to the subject Building and which is occupied by a dry-cleaning business on the ground floor. He contacted the brokers who he had used to insure that building and they gave him a quote to insure the Building as a whole in the sum of £871.85 inclusive of IPT.

14. That quote was contained in the email from Kruskal Insurance Brokers to David Freifeld dated 12 October 2015 and is calculated on a declared reinstatement value for the Building of £550,000 which Mr Fowler stated was based on the reduced figure of £250,000 adopted by Me Gerrard for the insurance of the two residential flats. In Mr Fowler's submission a reasonable sum for the Applicants to pay would be one-third of the £871.85 quoted.

The Respondent's Case

15. Mr Gerrard's position was that the Respondent had taken out insurance with a reputable broker who was aware of the claims history of the building and who was alive to the concerns of mortgagees that the Building be adequately insured. He stated that there had, unfortunately, been a number of break-ins to the ground floor of the Building and that there had also been a number of insurance claims involving water penetration from the residential flats, primarily the Applicants' flat. His position was that the revised premium was reasonable in amount.

16. He also relied upon a letter from the insurance brokers dated 21 October 2015 **[41]** in which they state that they are independent brokers instructed by the landlord and Lloyds TSB to effect a fully comprehensive buildings insurance policy for the Building and that the postcode in which the Building is located fell within the highest rated area according to Aviva Insurance Ltd. This, Mr Gerrard clarified, meant that it was in was in an area that attracted the highest premiums. The brokers also state that the rating for the Flat was, in addition, affected by the rating applied to the clothing shop on the ground floor of the Building.

The tribunal's decision and reasons

17. The tribunal determines that the amount that it is reasonable for the Applicants to pay towards the estimated insurance costs for the 2015/16 service charge year is 50% of the revised premium of £1062.80, namely £531.40.

18. There is insufficient evidence before the tribunal to lead us to conclude that that this sum is unreasonable in amount. We consider that whilst the costs of services provided by a landlord must be reasonable, the fact that they could have been obtained at a lesser cost does not necessarily mean that the actual cost is unreasonable. In addition, a landlord is not under an obligation to find and accept the cheapest possible insurance premium.

19. On the available evidence we do not consider the premium of £1,062.80 to be so manifestly excessive that it was unreasonable for the landlord to accept that premium.

20. We do not find the emailed quote obtained by Mr Fowler to be of assistance because, by his own admission, he did know the claims history of the Building and so did not pass this information on to the insurance broker. The quote cannot, therefore, be considered to be a like for like quote.

21. The obligation under clause 4(e) of the Lease is to insure *"the building of which the demised premises form part..."*. The Applicants did not contend that insuring the ground floor and upper floor parts of the Building separately was a breach of this covenant and as a matter of construction of the lease there would seem to be nothing to prevent the landlord from doing so, However, in the tribunal's view it would be good practice for the Respondent to ensure that each lessee of the Building is provided with evidence that the whole of the Building is, at all times, properly insured.

Management Fees (£600)

The Applicants Case

22. The Applicants' position was that a Building of this nature, with only two residential flats and with very limited communal areas (a hallway and stairway) would be a very easy property to manage and therefore the fees budgeted for (£250 plus VAT) per flat were excessive. Mr Fowler acknowledged that there was no evidence before the tribunal to support that assertion but, nonetheless contended that a fee of £150 per flat plus VAT would be appropriate.

23. He confirmed that it was not part of the Applicants' case that these costs were not recoverable under the terms of their lease but, rather, that the sums were excessive.

The Respondent's Case

24. In response, Mr Gerrard stated that his company manages about 10 to 20 buildings of this type, each of which contained two residential flats, and that the minimum fee charged was £250 plus VAT. In his view it was not possible to carry out a professional job for less than this sum. He stated that his company employed three members of staff and a block manager to oversee the running of the block and that the management fee included the following items:

    (a) Effecting insurance;

    (b) Collecting the ground rent and service charge and chasing arrears;

    (c) Setting the annual budget;

    (d) Processing bills and payments;

    (e) Carrying out inspections of the Building every 3-4 months;

    (f) Collating papers for the accountants in order to prepare the accounts;

    (g) Appointing contractors to deal with general repairs;

    (h) Obtaining a health and safety risk assessment and fire plan every two years; and

(i) Removal of estate agent's boards erected without the landlord's consent.

The tribunal's decision and reasons

25. The tribunal considers the estimated management fee of £250 plus VAT per flat to be reasonable and payable by the Applicants. We accept Mr Gerrard's evidence as to the management tasks covered by this fee and whilst we accept that the amount of management involved for a building of this nature is modest we do not consider it realistic that these tasks could be carried out for the figure of £150 plus VAT suggested by Mr Fowler. There is no documentary evidence before us by way of comparable quotes for similar properties and given this lack of evidence we see no reason to conclude that the sum demanded by the Respondent was unreasonable.

Reserve Fund contribution (£1,800)

The Applicants Case

26. It was common ground between the parties that the brought forward balance of the reserve fund in the 2015/16 service charge year was £3,850. Payment of the £1,800 demanded by the Respondent would therefore increase the balance to £5,650.

27. Mr Fowler acknowledged that by letter dated 20 October 2015 the Applicants had received a Stage 1 Notice of Intention to carry out works to the Building specifying the intention to carry out internal and external repairs and redecorations. Mr Gerrard indicated that the external works were to be to the rear of the Building.

28. The Applicants, according to Mr Fowler, agreed that external works were needed to the rear of the Building. However, they considered the interior was in not too bad a shape and that internal works could wait for another year. He accepted that plaster was blown in the communal hallway but considered this could be patched up and made good and that the wider internal works proposed could wait a year.

29. The advantage of waiting for a year would, he suggested, be that the cost to the Applicants would be spread out. The Applicants could, he conceded, afford to pay the sum demanded but they felt it to be too high. As such, their position was that the £1,800 demanded should be reduced to omit the costs of the internal works.

30. Mr Fowler informed us that he had obtained his own oral quote from a contractor for the costs of carrying out internal and external repairs and redecorations and that this quote was in the sum of £5,000. However,

the external works quoted for were for works to the front of the Building and not the rear.

The Respondent's Case

31. Mr Gerrard stated that the proposed major works were scheduled to start in the New Year, weather dependent, following completion of the s.20 Landlord & Tenant act 1985 consultation procedure, of which the Notice of Intention was the first stage.

32. The intended interior works included: stripping all the wallpaper in the communal areas and re-painting; repairing and making good an area of blown plaster in the hallway; repairing blown plaster to the ceilings in the common parts and making good.

33. The intended external works to the rear included: erecting scaffolding or a cherry picker; replacing slipped tiles on the roof; replacing or repairing the rear window to the Flat which has a rotten external window sill; cutting back, rendering and making good an area around the boiler ventilation flue to the Flat where someone had used expanding foam to fill in gaps following installation of a new flue; repairing or replacing rainwater down pipes; and re-pointing to the rear elevation. He also intended to take advantage of the presence of a cherry picker or scaffolding to identify if the dormer windows on the first and second floors of the Building needed to be replaced or made good and to see if the flashings to the roof needed attention.

34. Mr Gerrard pointed out that included in the sum demanded for the reserve fund budget was £500 towards the likely future cost of repairing the roof which was, he thought, over 20 years old. As the roof would, at some point in the future, need to be replaced at a likely cost of about £10,000 he considered it appropriate to budget for it now and not to wait until the works became more urgent. For that reason he considered it important that the reserve fund was not exhausted as a result of the major works exercise and that some funds should be retained to fund the future costs of replacing the roof.

The tribunal's decision and reasons

35. The tribunal determines that the amount payable by the Applicants towards the reserve fund budget for the 2015/16 service charge year is, as demanded by the Respondent, 50% of £1,800, namely £900.

36. We consider this to be reasonable given the extent of the impending major works for which the Applicants have already received the first s.20 consultation Notice. We do not agree with Mr Fowler that the internal works, which the Applicants conceded were needed at some point, should be deferred for a year. This is for two reasons. Firstly, Mr

Fowler conceded that the Applicants could afford to pay the amount demanded so the issue of staggering works purely to make them more affordable to lessees does not arise. Secondly, there are likely to be economies of scale in having contractors already on site carry out both the external and internal works.

37. It is clear from the description of the intended works given to us by Mr Gerrard that the proposed major works are substantial and that they are likely to substantially deplete the proposed reserve of £5,650. In the absence of any persuasive evidence to the contrary we consider that the whole of the sum demanded by the landlord is reasonable for the Applicants to pay. The quote obtained by Mr Fowler was insufficient to persuade us otherwise as: (a) it was oral and there was no documentary evidence before us as to what works were proposed; and (b) it was largely irrelevant as it related to the works to the front of the Building and not the rear.

38. We also agree with Mr Gerrard that there is merit in not completely exhausting the reserve fund so that a balance remains to deal with unexpected repairs. However, whilst we consider the overall amount demanded to be reasonable (given the impending major works) this should not be seen as an indication that it would be reasonable, in forthcoming years, for the Respondent to continue to budget for and demand sums from the lessees towards replacing the roof of the Building. This may, or may not be appropriate depending on the state of the roof. We suggest, therefore, that it would be prudent to examine the condition when the cherry picker or scaffolding is in situ so that the Respondent can identify when replacement is likely to be needed.

Application under s.20C

39. In their application form, the Applicants applied for an order under section 20C of the 1985 Act preventing the Respondent from passing any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

40. The tribunal first invited Mr Gerrard to state which provision or provisions in the Lease entitled the Respondent to seek to recover these costs through the service charge. He conceded that the only provision that could arguably entitle the Respondent to do so was clause 2(18) which concerns expenses *"...incurred by the Lessor of and incidental to the preparation and service of a notice under Sections 146 and 147 Law of Property Act 1925....."*.

41. He also agreed, however, that there was no suggestion that forfeiture proceedings under s.146 or 147 of that Act had been contemplated by the landlord. That concession must be correct in light of the fact that the Applicants had paid the sums demanded from the Respondent,

albeit in protest, whilst still maintaining their right to pursue this Application.

42. In our determination, there is no provision in the Lease that entitles the Respondent to pass any of its costs incurred in connection with these proceedings through the service charge. There is therefore no need for us to make any order under s.20C.

43. If the Lease did allow for such recovery then we would have declined to make an order under s.20C given that: (a) the Applicants have had very limited success in this Application and the success that they have had is due to concessions, made by the Respondent prior to the hearing of this Application; and (b) the evidence indicates, as submitted by Mr Gerrard, that these proceedings were initiated without first making adequate attempts to resolve the matters in dispute without recourse to this tribunal.

44. Mr Fowler informed us that he believed that there had been telephone conversations between Mr Freifeld and someone at Martyn Gerrard disputing these charges and that he had overheard one such conversation. However, he did not know who Mr Friefeld had spoken to nor exactly what was said.

45. Mr Gerrard could not personally recall speaking to the Applicants before the Application was made. In fact he had invited them to withdraw the Application in his letter of 1 September 2015 **[37]** so as to save unnecessary costs.

46. Given the complete absence of any written communications disputing the charges and the unsatisfactorily vague oral hearsay evidence of Mr Fowler the evidence, in our view, indicates that the instigation of these proceedings was premature and that this Application could have been avoided if the Applicants had fully engaged with the Respondent.

Costs

47. At the hearing Mr Gerrard invited the Tribunal to make an order that the Applicants pay something towards the Respondent's costs of defending this Application. The Tribunal explained that its jurisdiction to make such an order is limited.

48. The relevant rule is Rule 13 of the *Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013* which provides at Rule 13(1) that the tribunal may make an order in respect of costs only:

    (a) under section 29(4) of the Tribunals Courts and Enforcement 2007 (wasted costs) and the costs incurred in applying for such costs; or

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings

49. The full text of the Rules are set out in the appendix to this decision but the Respondent should note Rule 13(5) which provides that an application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends:

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

50. If the Respondent wishes to pursue an application for costs it may do so by writing to the tribunal but it should bear in mind the limited circumstances in which costs can be awarded as set out in Rule 13(1).

Name: Amran Vance **Date:** 2 November 2015

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.

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

13 Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the

proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.