1852

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AD/LSC/2015/0102**
Property	:	**Flat 125, Frobisher Road, Erith, London DA8 2PU**
Applicant	:	**Olufemi Ojo**
Representative	:	**Self represented**
Respondent	:	**Admiralty Park Management Company Limited**
Representative	:	**Mr Green, agent for SLC Solicitors, Shrewsbury**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Hargreaves** **K. Cartwright JP FRICS**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**25th June 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that nothing is payable by the Applicant in respect of the service charges for the years 2010-2014 as claimed in the service charge demands the subject of the application to the tribunal.

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2010-2014.

2. Proceedings were originally issued in the County Court sitting at Dartford under claim no. A31YM944 by the Respondent, seeking a money judgment against the Applicant in respect of arrears of service charge and ground rent. No details of the proceedings were provided but there is on file a copy of an order made on 23rd January 2015 (dated 25th February 2015) by DDJ Phillips which contains the following direction 3: *"Unless the [Applicant] has by 4pm on 20/2/15 applied to the First-tier Tribunal Property Chamber for a determination of any issue he seeks to raise with regard to management accounts and/or service charges in respect of the periods and sums pleaded in the claim he shall be deemed to be restricting his defence to the effect and provisions of s21 LTA 1985"*. It appears that the Applicant had dragged his feet in defending the county court proceedings (see eg direction 1 of that same order).

3. The Applicant made his application to the tribunal in time, as it was received on 19th February 2015. Detailed directions were given at a case management conference on 31st March 2015. The Applicant says that consequently the county court proceedings have been stayed pending the outcome of this decision, though we have seen no order to that effect and there has been no statutory referral as such. The CMC was attended by the Applicant and Mr Green, and all parties would have to agree that although the directions have been superficially complied with, there has been a lack of attention to detail. The Applicant's complaints have been unparticularised, and the Respondent's response as unhelpful. Further, neither side actually considered the question of construction of the relevant lease, as set out below, though it appears that there has been previous litigation in the tribunal, the details of which were not before us.

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

The hearing

5. Immediately prior to the hearing the Applicant handed in a further supplementary bundle which did not really add anything to his case or feature in the disposal of the application. Nor was there any objection to their introduction by Mr Green, as was sensible. References to page numbers are to those in the trial bundle put together by the Respondent. The Applicant and the Respondent relied on the same documents so there was a certain amount of duplication (the documents were basically those disclosed by the Respondent), but the Respondent did not produce any invoices for work relating to Flat 125 or any accounts explaining precisely how the service charge demands issued to the Applicant (p144 and following) were calculated, either in relation to works carried out or the terms of the lease. It transpired over the course of the morning that the reason for this is that management of the estate as a whole is conducted on a basis which essentially pays no regard to the service charge recovery provisions of the Applicant's lease, though managed on a basis said to be *"expedient"*. Therefore, when the Respondent argued that it was disproportionate to be required to answer the Applicant's case in detail[1] it was approaching the dispute from the wrong angle, as became evident. What the Respondent has to do in a service charge case *is* at least be able to demonstrate in relation to the claim it makes against the Applicant that it has the right under the contract to claim the relevant charges. There is no point in arguing that the estate as a whole is reasonably well managed and the service charges as a whole therefore reasonable in amount and reasonably incurred: that might be an appropriate approach for mediation, but cannot be applied to a formal determination of a *s27A* application which requires an analysis of the particular lease in question.

The background

6. The property which is the subject of this application is a two bedroom flat in a purpose built block of sixteen flats, on the first floor. There are four flats per floor. We ascertained that it is in a block comprising flats 113-143. The estate as a whole as built comprises twelve blocks. Three are owned and managed by London and Quadrant Housing. Nine are owned by Freehold Managers PLC and managed by the Respondent on its behalf.

7. No inspection was requested or made, and it would have been unnecessary in the circumstances.

8. The Applicant holds a long lease of the property (p127) which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge as follows. The lease is dated 24th September 1993 and was granted for a term of 99 years from

[1] And the tribunal accepts that the Applicant's case was vaguely put

1st March 1991. Fundamental to the construction of the lease is a lease plan which was clearly attached to the lease but was not in evidence. Despite an adjournment to track it down, the best that Mr Green could provide was a copy of the file/title plan for the freehold title (it appears: SGL568231) but it was agreed that this could not be the lease plan because that clearly identifies various parts of the estate by reference to a key which does not appear on the file plan. The Respondent was required to produce a copy of the lease, and that obviously includes any plan attached.

9. There are key definitions in the lease including *"Plan", "Flat", "Building", "Adoption Areas", "Parking Areas", "Forecourts, "Accessways", "Communal Grounds", "Communal Grounds", "Management Areas", "Management Expenditure", "Management Expenditure Year", "Management Charge", "Maintenance Expenses"* (p127-9). Without going in to these definitions in detail, they provide as follows. The lease provides that Flat 125 is in the *Building*. All parties agreed (in the absence of the plan but on instructions to Mr Green) that this means the block of sixteen flats now numbered 113-143 including Flat 125.

10. The *"Management Charge"* is payable by the Applicant pursuant to the Fourth Schedule of the lease (p137). See clause 5 of the lease. The *"Management Charge"* is defined as follows:- *"The annual contribution payable by the Tenant under the provisions of this Lease which shall be such proportion of the Management Expenditure in respect of the matters specified in Part One of the Fifth Schedule hereto and such proportion of the Maintenance Expenses in respect of the matters specified in Part Two of the Fifth Schedule as shall be certified annually as being just and equitable by the accountants and/or auditors to the Company or its or their managing agents as soon as reasonably practicable at the end of the Management Expenditure Year to which such certificate relates ...".* Such financial statements as approved (p152 onwards) apply to the whole of the estate rather than the *Building* and the *Management Areas* as defined.

11. The Respondent's covenants are set out in clause 6 and the Fifth Schedule. Part 1 of the Fifth Schedule is headed *"Covenants by the Company [Respondent] in relation to the Building"*. Part 2 is headed *"Covenants by the Company in relation to the Management Areas"*. The lease plan is properly required to construe what is meant by *"Management Areas"* though it is clear that so far as they include *"Parking Areas"* those relate to the parking spaces which are demised with the flats in the *Building* as defined. It follows that the Applicant's service charge liabilities are determined by a regime which limits recoverability to charges levied in relation to the *Building* and the relevant *Management Areas*.

12. Mr Green told the tribunal on instructions, in response to our initial inquiries, that Flat 125 attracts a charge of 0.6944% of estate costs and

1.0272% of block charges. There is nothing in the lease which justifies these percentage charges as such, and the charge for estate costs is questionable as a matter of construction of the lease. Mr Green accepted that he could not come up with any mathematical justification for these percentages either himself or on instructions.

13. The question we put to the Respondent in the light of this brief over view was: how did the service charge demands come to be levied by reference to the charging provisions of the lease? The short answer appeared to be: this is the way the Respondent has run the estate. In other words the Respondent could not submit that it had followed the service charge regime outlined above. Later, after a substantial adjournment for Mr Green to take full instructions, he sought to justify the Respondent's position by seeking to argue that the Respondent was entitled to charge the Applicant on this basis by virtue of an estoppel by convention as this was the way in which the service charge had been calculated for a number of years. All blocks, he argued, were treated to the same regime and there were useful and beneficial economies of scale. That, with respect, arguably confuses management with charging for it, though it might well be that the Applicant benefits. But it also runs the risk that a tenant in one building is charged for works carried out in another building for which he has no liability: that much is clear from the schedule submitted by the Respondent at p25-32 (which starts with a charge for another block for which the Applicant has no liability). Further, it would be wholly unacceptable to allow a litigant to put forward such an argument at this late stage, without pleadings, evidence, and advance notice to the Applicant that the Respondent was claiming the service charge on some variation of the contractual basis.

14. For these reasons, when Mr Green applied for an adjournment, the tribunal refused the application: there appeared to be nothing that could be done during an adjournment to get the case back onto a proper footing.

15. A *s27A* application relates to service charges. *S18* defines service charges by reference to what is payable by the tenant: the tenant's liability is a matter of contract. If the charges do not take into account the contract, then the question of reasonableness does not arise: the tribunal needs to know what precise liability the tenant is said to bear first.

16. In the absence of any clarity with reference to the lease as justifying the service charges levied against the Applicant, it is inevitable though regrettable in some respects that the Applicant succeeds so emphatically. It is clear that he owes the Respondent at least something in respect of service charges but impossible to determine what that might be on the basis of the lease and the limited evidence before the tribunal.

17. It follows that a *s20C* order is inevitable. Given, however, the progress of the county court proceedings and the fact that it appears that the

Applicant was obliged to issue the application to keep his defence alive in that jurisdiction, there is no good reason to order the Respondent to reimburse his application fees.

Judge Hargreaves

K. Cartwright JP FRICS

25th June 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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, 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 to them by the payment of a service charge.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).