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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00BD/LSC/2014/0612

Property : 2 Bychurch End, Teddington TW11
8PS

Applicant : The Lucas Smith Family Settlement

Represented by : Mr E Lucas-Smith
Also in attendance Mr C Green

:

Respondent : Bychurch End Resident's
Association Ltd

:

Represented by : Ms Jill Kirby –secretary
Also in attendance Mr Tim Kirby
Mr P North Director

Type of Application : Application for a determination
under Section 27A of the Landlord
and Tenant Act 1985

Tribunal Members : Ms M W Daley LLB (Hons)
Mr M Taylor FRICS

**Date of Hearing and
determination and
venue** : 10 February 2015 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 18 February 2015

DECISION

Decisions of the Tribunal

- (1) The Tribunal makes the various determinations set out in the decision below.
- (2) The Tribunal determines that the sum of £114.17 for tree work is reasonable and payable subject to a compliant demand having been made.
- (3) The Tribunal determines that the sum claimed for electricity for the years in issue as set out below is reasonable and payable.
- (4) That the sum of £114.00 claimed for cleaning in the common part is not reasonable and payable.
- (5) The Tribunal determines that the lease makes no provision for the payment of the cost of the Tribunal proceedings. Accordingly no order is made under section 20 C of the Landlord and Tenant Act 1985.

The application

1. The Applicant sought a determination was sought in respect of the reasonableness and payability of service charged for the periods 2009/10, 2010/11, 2011/12, 2012/13 and the current period 2014/15.
2. Directions were given by the Tribunal at a Case Management Conference on 4 December 2014.
3. On 13 February 2015 after the hearing, further written submissions were sent to the Tribunal, on behalf of the Respondent, these have not been considered by the Tribunal as no directions were provided for further submissions. Accordingly the application has been decided on the basis of the evidence which was before the Tribunal at the hearing on 10 February 2015.

The matter in issue

4. The Directions identified the following issues-: The Applicant seeks a determination of the Applicant's liability to pay for electricity, cleaning and tree works... They say that the landlord paid for tree works from the reserve fund and should not have done and as such is now out of time for demanding payment from them and that the reserve fund should be credited... It is the applicant's case that their lease does not require them to pay for such charges. They do not appear to question the reasonableness of the charge and seek only a determination of liability to pay..."
5. The relevant legal provisions are set out in the Appendix to this decision.

The background

6. The premise which is the subject of this application is a ground floor flat situated in a development of three blocks of flats and a maisonette (the Vicarage). The Applicant is the Trustee of the Lucas- Smith Family Settlement. The Respondent, Bychurch End Residents Association Ltd (BERA) is a private limited company formed for the purpose of purchasing the head lease.
7. The Bychurch End estate was developed in 1979/80 on a Freehold site owned by the London Diocesan Fund- by Speyhawk Land and Estate who acquired a leasehold interest within a Head lease, the lessor's responsibilities were transferred to BERA in 1996. The Freeholder has retained the under lease of the maisonette.
8. The Applicant purchased a long lease of the flat on 25 February 2009, which required the landlord to provide services and the Applicant, as a leaseholder, to contribute towards the cost of the service, by way of a variable service charge.
9. The development has two different leases, one for the ground floor flats and the other for the first and second floor flats, the maisonette is subject to separate arrangement, which have not been considered as neither party raised any issues concerning them.
10. It was accepted by the Respondent that the leases for the premises above the ground floor had an additional obligation to contribute to the cost of the lighting and cleaning of the common parts for access to the upper levels.

11. This is set out in clause 5.5. of the leases for the upper level flats, which states-: *So far as practicable to keep carpeted clean and reasonably lighted and in good repair and condition entrance halls foyers passages landings staircases and other parts of the building so enjoyed or used by the Lessee in common aforesaid.* This additional contribution is set out in 3 (e) at 33.33%. This provision is not in the Applicant's lease.

The Hearing

1. At the hearing the Applicant represented himself assisted by Mr Green and, the Respondent was represented by Mrs Kirby secretary of the resident's association.
2. The Tribunal decided that they would consider each of the years in turn, where a charge was in issue for more than one year, the Tribunal would consider the issues for all of the years in question.
3. The Tribunal were informed that the first issue related to the year 2009/10 which was the cost of tree maintenance in the sum of £114.17, the Tribunal was informed that the tree in question was situated in the far corner of the car park and had become a nuisance in that it was over hanging. The total cost of the work was £1370.00. Mr Lucas- Smith did not object to the cost of the work his issue was that the cost occasioned by the work had been taken from the reserve fund. The Tribunal were referred to the provisions of the lease which stated at 3 (2) F the expression " the expenses and outgoings incurred by the Lessor" as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure ... described which has been actually disbursed incurred or made by the Lessor during the year in question but also such reasonable part of all such expenses outgoings and other expenditure...which are of a periodically recurring nature (whether recurring by regular or irregular periods) when ever disbursement incurred or made including a sum or sums of money by way of reasonable provision for anticipated expenditure... from time to time to put to reserve to meet the future liability of carrying out the major works to the Building with the object as far as possible of ensuring that the Service Charge shall not fluctuate substantially in the amount from time to time..."
4. Mr Lucas-Smith stated that the sum incurred was not for the work to the building and as such, should be repaid to the reserve fund.
5. In answer to questions from the Tribunal he stated that he had not been aware that this charge had been taken from the wrong account until sometime in 2011.

6. It was accepted by Mr Lucas-Smith that he was required to contribute to the cost of this work, and no issue was raised concerning the reasonableness of the cost or the standard of work, the sole issue was whether the sums had been incorrectly taken from the reserve account.
7. In reply Ms Kirby accepted that the sum had been taken from the reserve, she stated that the cost had been incurred at the end of the financial year and that the then managing agents had decided that it was appropriate for the sum to be taken from the reserve to avoid substantial fluctuations in the service charge, by way of example she stated that the previous years charge had been £16421.06 and as a result of a fire risk assessment and asbestos risk assessments the service charges had risen to £17429.00. In the Respondent's statement of case it was stated that:- There is nothing in the lease to preclude extending the spirit of the relevant clause in this way, nor had there been in the agreement by the lessees to the creation of the fund.

8. The Decision of the Tribunal

The Jurisdiction of the Tribunal is set out in section 18 and 19 of the Landlord and Tenant Act 1985. Section 19 states:- *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.*

9. No issue is raised that the cost themselves were not reasonably incurred, the only issue was whether sums could be taken from the reserve fund to deal with a maintenance expense which was not related to the building cost, or whether as stated by Mrs Kirby the spirit of the lease was wide enough to include maintenance to the "the area" or "the parking space" as defined by the lease.
10. The Tribunal noted that this was not the usual type of dispute, concerning whether or not a sum was payable in accordance with the lease provisions, it was the case that this cost had been properly incurred in accordance with the terms of the lease, and the only issue was whether it should have been taken from the reserve or demanded as a balancing charge, the Tribunal have not found it necessary to determine this issue, as the cost was properly incurred in accordance with the lease provisions which provide that there is an obligation on the landlord 5 (4) in respect of the upkeep of the common area, and that as such there is a mirroring obligation on the leaseholder to contribute to such cost set out in part iii of the third schedule. Given this the Tribunal determine that the only dispute is whether the funds came from the right part of the service charge budget and this is not in of itself a matter for the Tribunal.
11. The Tribunal therefore determine that the sums claimed were reasonably incurred, however the Tribunal note that there is still an obligation on the landlord to serve a demand for this sum which should include a copy of the summary of rights and obligations in accordance with the 2007 Regulations, unless the landlord has demanded this sum as a service charge, there is an issue that this sum may not be

recoverable as the sum may not have been demanded in accordance with the above Regulation.

12. Section 20B of the 1985 act sets out that such sum claimed for service charges are not payable unless they are demanded within 18 months of the cost being incurred.
13. The Tribunal have not been asked to determine whether this sum has been correctly demanded and accordingly finds that the sum of £114.17 is reasonable and payable subject to a compliant demand having been made.

The cost of electricity to the common parts

The cost of electricity for the years in issue was as follows:-

2010/11	2011/12	2012/2013	2013/14	2014/15
£28.09	£24.44	£35.00	35.88	£38.00

14. Mr Lucas-Smith stated that the original plan of the building had not included the lobby area, and the responsibility for contributing to the cost of electricity in the common parts as set out in clause 5(5) above was not in his lease. The Tribunal was referred to a guide for resident's which clearly set out that the upper floors contributed to the upkeep of the common parts of the building.
15. It was common ground between the parties that at some stage prior to the occupation of those present at the hearing, the lobby area had been created by enclosing the space in front of the building, so as to form a covered entrance area which was accessible by a door.
16. The Applicant was required to contribute to external lighting on the estate, however there was no information as to whether this area had been lit prior to the area being enclosed.
17. In reply Mrs Kirby stated that she had been informed as set out in the statement of case that "*...The ground-floor foyers were created about 11 years into the tenure of the leases. The additional costs associated with them therefore have to be allocated as a Service Charge according to clause three (ii) 4 of the leases. The purpose of the change to the initial build wa not in itself to create a foyer for the benefit of the ground-floor flats but to provide security for all flats by enclosing them within security doors with an intercom. That the change represented a benefit to all flats was recognised in the unanimous agreement of all lessees of the flats to make the change and share the costs...*"
18. At some later stage the issue of the cost of lighting the lobby had been raised by a leaseholder on the upper level, who considered that it was unfair that the ground floor leaseholders did not contribute to the cost of the lighting of the lobby. A letter was sent to the ground floor leaseholder on 24 March 2009 asking for their agreement to contribute to the cost On 26 March 2009 Mr Lucas-Smith indicated that he was prepared to contribute, to this cost and by the same letter he asked whether the lease would be varied.
19. Mrs Kirby noted that the Applicant's lease provided on the Third Schedule Part ii 4 that -: *The cost of all other services which the Lessor*

may in the interest of good management and with the approval of a majority of the lessees of the flats provide or install in the Building for the comfort and convenience of the lessees..." Mrs Kirby sought to rely upon this clause.

20. Mr Lucas-Smith in answer to the issue of whether he had agreed to contribute to the electricity cost stated that this issue had arisen shortly after the purchase of the lease. He stated that the Applicant was not unhappy to contribute to this charge however he had understood that a formal variation of the lease would occur, and that as this had not happened the Applicant was under no obligation to contribute to the cost of the electricity.
21. The Tribunal noted that the issues concerning the cleaning of the common parts in the sum of £114.00 raised substantially similar issues, concerning the interpretation of the lease. Given this, this issue would be considered together with the cost of the electricity.
22. Mrs Kirby noted that there was an error in the charges in that the intention was to charge one third of the cost of the cleaning to the ground floor occupants, with the Applicant's share being 25% of those cost, the total sum which ought to have been charged was £40.00. Mrs Kirby conceded that this was the full sum of the Tribunal's claim.

The decision of the Tribunal

23. The Tribunal accept the submissions of the Respondent that the lease provides the Respondent with some latitude to provide services over and above those set out in the lease, if such services are agreed as being "*...in the interest of good management and with the approval of a majority of the lessees of the flats provide or install in the Building for the comfort and convenience of the lessees...*"
24. The parties were not privy to the original decision to provide a covered entrance and the Tribunal note that this area was at ground level and that the lease provided that the Applicant would contribute to the cost of lighting to the exterior as set out in the lease although this area is now enclosed it was part of the area which the Applicant was originally required to contribute to the upkeep of. Accordingly the Tribunal determine that as Mr Lucas-Smith agreed to pay for the cost of the lighting, the charges for this service may be recovered in accordance with the Third Schedule Part ii of the lease.
25. The Tribunal have noted that there is no agreement for the cost of the cleaning to be provided for in this manner, and that as such the only parties who were originally obliged to contribute to the cleaning were the upper floor flats. The Tribunal finds that in the absence of the agreement of the parties to contribute to this cost that the sums incurred are not within the scope of the lease.
26. The Tribunal noted that Mr Lucas-Smith considered that the landlord may need to vary the lease, however the Tribunal does not consider that the issues raised by such a variation, form part of this Tribunal's determination.

Application under s.20C and refund of fees

27. The Tribunal noted that there was no application for a re fund of the Application or hearing fees.
28. The Tribunal accordingly makes order for reimbursement of fees in this matter.
29. The Tribunal noted that the lease did not provide for the cost of the Tribunal hearing and preparation to be recovered as a service charge. Mrs Kirby on the Respondent's behalf had conceded that such cost would not be claimed accordingly no order is made under Section 20C of the Landlord and Tenant Act 1985.

Name: Ms M W Daley

Date: 18 March 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).