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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KG/LSC/2016/0041**
Property	:	**27 Cumberland Road, Chafford Hundred, Grays, Essex RM16 6ER**
Applicant Represented by	:	**The Sandpipers (No. 2) Chafford Hundred Ltd. Peter Humphreys, solicitor, of J B Leitch Ltd.**
Respondent	:	**Thomas Michael Peebles Self representing**
Date of Transfer from the county court	:	**7th March 2016 (lease rec'd 21st June)**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Roland Thomas MRICS John Francis QPM**
Date and Place of Hearing	:	**5th September 2016 at The Park Inn by Radisson Thurrock, High Road, North Stifford, Essex RM16 5UE**

DECISION

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1. In respect of the amount claimed by the Applicant from the Respondent in the sum of £3,630.18 for service and administration charges, the Tribunal finds that £3,555.18 of that sum is reasonable and payable by the Respondent. The administration charge of £75 is found to be unreasonable and not payable.

2. All other matters relating to interest, court fees and costs incurred in the county court plus any set off or counterclaim are transferred back to the county court sitting at Basildon under claim no. B5CW4R72 subject to the comments made below.

Reasons

Introduction

3. This is a claim brought in the county court by the Applicant, claiming in such proceedings to be the landlord and/or management company appointed by the lease of the property, against the Respondent who is the current long leaseholder. Such property is part of a large, fairly modern development of flats and houses. The claim seeks to recover service charges going back to 1st June 2012 plus an administration charge of £75. The Applicant's evidence to the Tribunal is that it is not the freehold reversioner of the property.

4. The 'defence' filed by the Respondent in the county court proceedings is, in fact, a defence of set off and/or a counterclaim which says:-

> *"Defence ON GOING DISPUTE. I HAVE A LOUD NOISE COMING FROM MY ROOF SPACE & THIS KEEPS ME AWAKE AT NIGHT, PLEASE ASK DUCAN PHILLIPS TO PROVIDE COPYS OF APPROX 50+ EMAILS ASKING FOR REPAIRS TO BE CARRIED OUT. THE WORKS CARRIED OUT DO NOT MEET BUILDING REGULATIONS I HAVE NOT RECIVED ANY SERVICE & HAVE BEEN TOLD TO NO LONGER CONTACT"*

5. The Respondent also admitted owing the sum of £1,648.61 and a cheque in this sum was sent to the Applicant's solicitors on the same date as the defence. This sum is not quantified in any way. For some completely inexplicable reason, the cheque was not cashed. The statement prepared by Peter James Humphreys, the solicitor employed by J B Leitch Ltd. to represent the Applicant, says that the cheque "*was not cashed but was retained on the file pending the outcome of the legal proceedings and so as to preserve the Applicant's ability to recover the full balance of service charges and fees owed plus interest and costs thereon as claimed*".

6. This money would have helped the Applicant and, as any solicitor would or should know, a letter to the Respondent saying that the payment was accepted under protest and on account of the claim, would have protected the Applicant's position. The only possible effect on the proceedings will be to inflate the claim for statutory interest on that money (assuming that the cheque had cleared) for over a year. As the statutory rate is far higher than the rate which the Respondent could have obtained on this money in the meantime, the motive for not cashing the cheque is questionable in the extreme.

7. In accordance with the Tribunal's directions, the Applicant has filed a statement in reply to the defence. However, it was also ordered to set out "*exactly what is allegedly owed to include the date incurred, a full description of the item claimed, the amount and any payments made*". No such list was included. The schedule at tab. B, page 53, which purports to be that list, simply sets out the amounts claimed and the dates. The Tribunal noted that assuming 6 flats in the service charge regime, the amounts claimed under items 1, 2, 3, 4, 5 and 6 are the

amounts claimed in the budgets at pages 96, 97 and 98. The £400 credit is in the statement of account at page 52. The £100 'balancing service charge deficit' appears at tab. B, page 106 as part of the £600 referred to. Finally, the £75 administration charge is justified by the statement saying that it is a letter before action sent by solicitors instructed.

8. In fact, the 'defence' does not actually dispute the reasonableness of the service charges or administration charge. The Respondent's reference to not receiving a service clearly relates the efforts made, or not made, to rectify the noise.

9. In connection with the noise, the Applicant's 2 statements set out in some detail the problems there were in identifying the cause of the noise. A10 Property Maintenance was employed in April 2012 and they say that they cured it. J.A. Laws Roofing Ltd. was employed in the same month and they say that they cured it. In October 2012 Cirencester Home Improvements Ltd. submitted an invoice for £1,050 for "roof repairs (felt, tiles and soffit board)". In March 2013, that same company invoiced a further £400 to "supply and install installation to eves and bond felt together".

10. In April 2013, a chartered surveyor, Paul Vanson BSc (Hons) MRICS, was employed by the Applicant to try to identify the problem and recommend a remedy. For some reason which is not identified, he did not obtain access to the roof void over the flat. He had access to the roof void over the common parts and to the exterior. His report, dated 5th April 2013 clearly confirms that the noise complained of was present. He says, on the second page, "*the noise was emanating from the eaves area of the roof*" and "*whilst we were within the roof space, the noise was more prominent and could be heard in the adjoining right-hand roof space*".

11. The surveyor's opinion is that the rafter ventilators are the most likely cause of the noise and they should be cut away. However, he then says that if this does not solve the problem, a further inspection would be necessary to include the roof void of the flat in question. MET Property Maintenance Ltd. attended the site in May 2013 and their invoice says "*to attend the above property to carry out works to the roof. Mr. Peebles was obstructive and works not carried out*". The Respondent then agreed to the works being undertaken on the 6th July 2013. He then postponed the work until 13th July and in amongst the copious copy letters and e-mails in the bundle provided for the Tribunal, there is evidence that the rafter ventilators were then removed, although there is no contractor's invoice to confirm this.

12. A letter was written to Mr. Peebles by the Applicant on 4th March 2015 setting out these facts and then asserting that "*we then heard nothing until you were asked to pay your service charge*". That assertion is not corroborated by the Applicant's managing agent's record of events at tab E, page 14 and onwards. That records sets out a series of communications with Mr. Peebles after 13th July 2013 wherein it is clear that (a) Mr. Peebles was still complaining about the noise and (b) the surveyor was not re-instructed as he himself had advised. The record

shows that the next request for service charges was on 29th May 2014 and this is at tab C, page 11 in the bundle. His reply within 25 minutes was "*The repairs to the roof are also unfinished and I told Margaret over 10 times I am not paying this charge to have sleepless nights*".

13. It should also be said that apart from a letter to the Tribunal from Kelly Glover which is said to be sent on behalf of the Respondent, nothing has been received from the Respondent, despite his being ordered to file and serve a statement of his case. The letter contains many comments and attaches a bundle of e-mails, none of which really helped the Tribunal understand exactly what the noise problem was or how it could be cured.

The Inspection

14. The members of the Tribunal inspected the property and the grounds around the flats in question in the presence of the Applicant's solicitor, Mr. Humphreys and Margaret Taylor from Duncan Phillips Ltd., the managing agents. The Respondent offered the Tribunal members access to the roof void over his flat and the Tribunal's valuer member went into that void. It is a standard truss roof which is felted. Mr. Peebles pulled out the insulation between 2 sets of rafters at eaves level and this revealed that the ventilators had been cut out and removed.

15. It was assumed that all the other ventilators fitted between the rafters had been similarly removed and insulation packed into the resulting voids. The sections of the ventilators fitted over the rafters remained as they could not be removed without taking away the roofing felt and tiles.

16. This inspection could obviously not be a full survey. There was no flapping noise at the time of the inspection although it was quite a calm day so far as wind was concerned. Mr. Peebles proffered a possible cause for the noise i.e. a suggestion that the roof lining is too long in places and goes right into the gutters and 'flaps' against the plastic guttering. If correct, the solution would be very simple i.e. to slice off a few millimetres off the lower section of the lining. However, he was not certain that this was the true cause.

17. Generally, the Tribunal noted that this was a block of flats of brick construction under a concrete tiled pitched roof with uPVC windows etc. The stairwell appeared to be reasonably well maintained and was clean with a carpet.

The Lease

18. The bundle of documents supplied for the Tribunal includes what purports to be a copy of the original lease which is dated 28th June 2002 and is for a term of 125 years from the 1st January 2002 with an increasing ground rent. It is a fairly standard modern tri-partite lease with the Applicant named as the management company. There are the usual provisions for the landlord to keep the structure and common parts insured and the management company to keep the buildings and common parts in repair. The main terms are set out in the Schedules and the covenants to abide by those terms are in clauses 3, 4, 5 and 6.

19. The service charge regime is in Schedule 7 which provides for the management company to collect an amount in advance of service charges being incurred on the 1st January and 1st July each year. Why the claims are being made on the 1st June and 1st December is not explained in the Applicant's statement. Service charge accounts then have to be prepared as soon as practicable after the 31st December 2016 and this has to be sent to the leaseholders if requested in writing.

20. Clause 1 of the Fifth Schedule is a covenant by the landlord to allow the leaseholder quiet possession subject to the covenants in the lease being complied with. It should be noted by Mr. Peebles that 'quite possession' does not refer to noise, *per se*. It just means that a tenant should be able to occupy the demised property without undue disturbance and excess noise emanating from common parts owned by the landlord could, in theory, amount to a breach.

21. Clause 1 of the Sixth Schedule is a covenant by the management company to keep the common parts and accessways in a good state of repair. The common parts would almost certainly include the roof voids. Thus, the Respondent's cause of action against either the landlord or the management company or both would be damages for breach of those covenants and/or a mandatory injunction ordering the Applicant to comply with the terms of the lease.

22. In the Seventh Schedule, it is clear that the management company can collect costs in respect of any actions brought or defended which will, of course, be administration charges. This Tribunal can assess their reasonableness.

The Law

23. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

24. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction under section 27A of the 1985 Act to make a determination as to whether such a charge is payable. Under the **Commonhold and Leasehold Reform Act 2002**, the Tribunal is given similar jurisdiction to deal with administration charges.

25. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J*

in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

The Hearing

26. The hearing was attended by those who attended the inspection plus Kelly Glover who was with the Respondent. She merely confirmed that the noise in the roof was loud and existed in windy conditions. The Tribunal chair explained to the parties that the Tribunal was in some difficulty because the defence did not dispute the reasonableness or payability of the service charges etc. and the noise problem had not been resolved either as to its cause or the cost of rectification.

27. Mr. Peebles confirmed that he had no problem with the reasonableness or payability of the service charges. He just wanted the noise stopped. He confirmed that he was a director of T & T Roofing Ltd. He and his co-director were expert roofers. There was a discussion about diagnosis and remedial work. Mr. Humphreys could not explain why the surveyor instructed by his client had (a) not inspected the roof void over the flat and (b) had not been re-instructed when it became obvious that the noise had not been cured by his suggested remedy.

28. Mr. Peebles was asked why he had not accepted the offer from the Applicant to effect remedial works. He said that he didn't want to take on that responsibility. Asked how much a 'cherry picker' would cost to hire for the time needed to find out if his theory was correct, he said that it would cost about £450 for a day an there may need to be traffic diversions. His view was that any remedial work would have to be undertaken from the outside.

Discussion

29. The Applicant's claim is for service charges and none of these items are disputed. It is not said that they are unreasonable. It therefore seems to the Tribunal that there is nothing to resolve so far as they are concerned. Having looked at the end of year service charge accounts, the Tribunal was not able to see any particular item that seemed to be outside the range of reasonableness.

30. The defence of set off/counterclaim is impossible to determine or quantify and the order from Deputy District Judge Oldham dated 29th March 2016 only asks the Tribunal to determine the "*liability and reasonableness of any service charges/services/works within its jurisdiction*". The jurisdiction of this Tribunal does not extend to determining the extent of or quantum of a claim for breach of the quiet enjoyment covenant on the part of the landlord or the failure to maintain covenant on the part of the management company.

31. Assuming the flat was finished in June 2002 when the lease commenced, it would still have been covered by the NHBC guarantee when Mr. Peebles first complained. The Tribunal has no knowledge of what communications there were with the NHBC. If a claim had been lodged at the time, it may be that such a claim could be continued. However, the main issue here is not really a 'raking up'

of past disputes but how a remedy can be found.

32. The Tribunal had some sympathy with Mr. Peeble's position in not undertaking the work himself. If his proposed remedy did not in fact work, he would no doubt be met with a blanket refusal to do anything further on the basis that it was his, Mr. Peebles', fault that no remedy could be found. Ms. Taylor made the point that no previous tenant had complained and no neighbour had complained. Indeed she tried to argue at one stage that there was no problem which was, of course, contrary to her own expert's observation. She pointed out that at one stage, Mr. Peebles had been written to giving him notice that if he didn't come back within a limited time to say that the noise was still there, it would be assumed that it wasn't. He didn't.

33. Whatever may have been said or not said, the evidence shows a clear and constant series of complaints over the last 5 years that the noise existed in windy conditions and caused sleepless nights and irritation. At one point it was even suggested that it caused depression. After some unsuccessful efforts to identify and stop the problem with contractors, a surveyor was instructed. When the noise appeared to emanate from the roof void over the flat, there is no explanation as to why the surveyor was not able to gain access to that roof void or why he bothered to continue with his investigation when he found this out.

34. He made a suggestion involving the removal of the ventilation trays which, as Mr. Peebles suggests, was contrary to building regulations. The Tribunal finds that such work was undertaken but did not remove the problem. If the Applicant had then instructed Mr. Vanson to do as he had advised i.e. inspect the roof void above the flat, then he would hopefully have been able to find a solution. It appears from the e-mail at tab C page 41 in the bundle that a cherry picker had been used by a previous contractor and a discussion between Mr. Vanson and that contractor may have proved or disproved Mr. Peebles' theory. Instead, another 3 years of discomfort for Mr. Peebles and his family have passed. No doubt a further investigation and report will be ordered from Mr. Vanson by the court.

Conclusions

35. Taking the evidence into account, the Tribunal determines that the service charges in the claim are reasonable and have been reasonably incurred. However, bearing in mind to inability of the Applicant to accept the advice of its own expert at the relevant time, the Tribunal finds that it is not just and equitable for the £75 administration fee to be allowed as reasonable.

36. If Mr. Peebles wants to pursue his claim either by way of set off or counterclaim, he will have to take more action to prove the claim so that the court will have some evidence upon which to base any order in his favour. As a preliminary, the Tribunal suggested that he instruct an expert of his choosing, perhaps a roofing expert, to identify the problem and possibly find a cure. This was going to cost money but if he wanted to prove his case, that was inevitable. If that expert could provide the answer, then that cost would be a paid from the service charge account. All that would be left was a claim for general damages. If no insurance

covered such a claim, Mr. Peebles would have to understand that he and his fellow long leaseholders would have to contribute to that – unless he decided to pursue the landlord for a breach of quiet enjoyment.

37. The parties should obviously understand that the Tribunal is simply trying to help them and the court by making these comments. This is not legal advice and Mr. Peebles is urged to seek such advice if his expert cannot resolve matters.

Costs and fees

38. The Tribunal will leave the general question of costs and interest in the court proceedings to the court. However, so far as interest is concerned, the court will no doubt bear in mind the Tribunal's comments in paragraphs 5 and 6 above about the failure of the Applicant's solicitors to accept the tendered cheque.

39. So far as costs and expenses are concerned, there seems to be some confusion in the minds of the Applicant or its solicitors. This case is allocated to the small claims track and the costs recoverable in the court proceedings are usually negligible. The Applicant is able to claim any costs over and above those ordered by the court as administration charges subject to any application to this Tribunal to assess their reasonableness. The relevant provision is as stated above.

40. The suggestion that the costs can be claimed as part of the forfeiture process is misconceived. As is clear from the relevant clause in the lease, such costs can only be claimed by the landlord, not the management company. The comment that such costs can be claimed as a contractual liability is correct but that does not mean that the reasonableness of such costs cannot be assessed by this Tribunal.

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Bruce Edgington
Regional Judge
7th September 2016

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.