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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UB/LSC/2016/0042**
Property	:	**165 Cherrydown East, Basildon, Essex SS16 5GL**
Applicant	:	**Graham Harrison Self representing**
Respondent Represented by	:	**Cherrydown Management Ltd. Mr. L. Harle, solicitor advocate**
Date of Application	:	**15th June 2016**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Evelyn Flint DMS FRICS IRRV**
Date and Place of Hearing	:	**28th September 2016 at The Court House, Great Oaks, Basildon SS14 1EH**

DECISION

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1. In respect of the amount of service charges and administration charges challenged by the Applicant, the decision of the Tribunal is that the balancing charges of £430.50 for the year ending 30th June 2013 and £172.32 for the year ending 30th June 2014 are not payable

2. The Tribunal does consider it to be just and equitable for an order to be made preventing the Respondent from claiming its costs of representation in respect of this application from the Applicant as part of any future service charge. Such an order is therefore made.

3. The Tribunal also determines that the fees paid by the Applicant to the Tribunal in the total sum of £280 should be reimbursed by the Respondent to the Applicant within 28 days of the date of this decision.

Reasons

Introduction

4. This is an application by the long leaseholder of the property against the management company whose task is to manage the estate in which the property is situated. The first point in issue is short and clear i.e. has the exception to the 18 month limit in section 20B of the **Landlord and Tenant Act 1985** ("the 1985 Act") been engaged? Another point is raised in the application i.e. whether the Applicant has been charged the correct percentage of the whole charges for the estate.

5. In accordance with the directions order made by the Tribunal on the 20th June 2016, the Applicant has filed a bundle of documents for the Tribunal. What is clear is that on the 16th April 2016, the Applicant, along with other leaseholders received a demand for service charges covering the years ending 30th June 2013 (£430.50) and 30th June 2014 (£172.32). The Respondent says that it had written to the leaseholders on the 9th December 2013 and 18th December 2014 warning them of these further charges. Copies were then sent to the Applicant, who says, in paragraph 14 of his statement, that "*the letter did not look familiar to me despite the fact that it was claimed that a similar letter was sent as recently as December 2015. I could find no record of this letter or anything similar in my home files*". Although this is a reference to one letter, the copies sent to the Applicant are said to be at Appendix N in the bundle which includes copies of both letters.

6. The letter allegedly sent on the 9th December 2013 says:-

> *"At the end of each service charge year what you pay and what we spend is inspected and certified by an external Accountant who compiles a set of service charge accounts.*
>
> *We like to get the accounts out promptly, preferably within 6 months of the year end. Sometimes this not possible for various reasons. And when the accounts are not delivered to us in time Section 20B of the Landlord and Tenant Act 1985 says that we should send you a list of expenditure whilst you are waiting.*
>
> *Don't worry, as soon as the external accountant finalises the accounts we will send every owner a proper set of accounts. There's nothing to pay now.*
>
> *Because service charges are collected for the specific purpose of maintaining the property the accounts will not show a profit or loss. If we've collected more than we needed you will get a credit, if we've spent more than we'll need to demand the shortfall. That way the books are balanced and the legal documents you signed when you bought your property will refer to this as a balancing charge.*

We will write again to you shortly and update you further. In the meantime, we are helping the Accountants so they can complete the final accounts"

7. The letter of the 18th December 2014 is written in very similar although not precisely the same terms. Neither letter says that there are any enclosures and there is no note on the bottom of the letters to indicate any enclosures as most professionally written letters would do if there were any. However, the Respondent says that there were 2 enclosures, namely a sheet of paper with a heading "Answers to common queries" and then what appears to be a list of service charges incurred for the years in question i.e. up to 30th June 2013 and 30th June 2014 respectively.

8. Interestingly, the first of the "Answers to common queries" poses the question 'do I have to pay anything now?'. The answer is "*no, and you may not have to pay anything at all, this letter is sent to you as a precaution as accounts have not yet been finalised and we have a duty to notify you of expenditure where it is possible that a deficit may have occurred*". In other words, the Respondent is saying, in effect, that it has no idea what may or may not be demanded in the future for the periods in question.

9. There are written statements from another 9 leaseholders which are all signed and have statements of truth. All except one say that they never received the letters in December 2013 and 2014. The other, Ildiki Zsebe, says he only acquired his leasehold interest in February 2014. He says that he has also been issued with a further demand but neither he nor his solicitors were warned of the likelihood of back charges being demanded either at the time of his purchase or since.

10. Of significance is an e-mail or contribution to an internet chat forum from a Jennifer Viccars dated 4th March 2016 at Tab F, page E1 in the bundle. She says:-

> "*Good morning all, sorry for the delay in replying to your messages. Please be assured that the directors are investigating these balancing charges. We were made aware of them a couple of weeks ago and have been trying to work with Ringley to (a) understand them and (b) validate them ever since. This is why you have not received a formal request for payment yet.*
> *I realise this doesn't change that they have still already been applied to your accounts online, but please be advised that this is known about, and a lot of people are giving up a lot of time for free to get this understood. Please shout if any questions – I'm trying to be as transparent as I can. Jennifer (Director Cherrydown Management Limited and leaseholder of multiple properties)*"

11. When the bundles arrived in good time for the hearing, the Tribunal chair noted the narrow issues to be determined. He also noted that the Applicant had said

from the outset that this matter could be resolved on a consideration of the papers only i.e. without an oral hearing. As the written evidence was comprehensive, the Tribunal chair caused a letter to be written to the parties about 10 days before the hearing asking whether they wanted to agree to the hearing being cancelled so that the case could be determined on a consideration of the papers only. If so, any hearing fee would be reimbursed. There was no such agreement. In fact no response was received from the Respondent.

The Inspection

12. As nothing in the unresolved issues required a pre-hearing inspection of the property, such inspection was cancelled.

The Lease

13. The bundle of documents supplied for the Tribunal includes what purports to be a copy of the lease which is dated 20th January 2012 and is for a term of 125 years from the 1st January 2009 with an increasing ground rent. It is a modern tri-partite lease with the landlord freehold reversioner, the management company and the leaseholder as parties. The Applicant is the original leaseholder. There are the usual provisions for the management company to keep the structure and common parts in repair. The landlord covenants to keep the property and the estate insured in the joint names of such landlord and the management company.

14. The service charge regime is in clause 5 and in the management company's covenants. The management company must keep proper books of account and "*as soon as practicable after each Accounting Year the Company shall prepare an account of the Expenses in that Accounting Year and the amounts received from the tenants of the Dwellings on account of the expenses for that Accounting Year*". The leaseholder must then pay any shortfall.

15. The Leaseholder's share of the service charges is stated to be 0.2448% of the total although on the copy lease seen by the Tribunal there is a handwritten note alongside saying "*0.2436% (July 2014)*". However, as the Respondent rightly points out, there is provision in the lease to amend that proportion if the stated proportion does not actually cover the leaseholder's share. This is quite a standard clause in a lease of a new property on a large estate such as this.

The Law

16. Section 18 of 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'.

17. 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.

18. Section 20B of the 1985 Act states that a demand for a service charge must be made within 18 months of it being incurred. If that doesn't happen, the service charge is not payable. Subsection 20B(2) then says that this rule does 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*".

19. Section 20C of the 1985 Act allows this Tribunal to make an order preventing a landlord or management company from claiming its costs of representation in this sort of application as part of any future service charge demand. The Tribunal's procedural rules (rule 13) allow a Tribunal, on its own initiative, to order reimbursement of any fees paid to the Tribunal in respect of the application.

20. In **Gilje and others v. Charlegrove Securities and another** [2003] EWHC 1248 (Ch), Etherton J. considered the effect of section 20B of the 1985 Act and made the following comment which is of relevance to the issue in this case i.e. "*Finally, I agree with Ms. Elledge that, so far as discernible, the policy behind section 20B of the 1985 Act is that the tenant should not be faced with a bill for expenditure of which he or she was not sufficiently warned to set aside provision*".

The Hearing

21. The hearing was attended by Mr. Harle, a solicitor from Ringley Legal and Mr. Harrison. Mr. Harrison made one or two comments on the Respondent's evidence as filed and Mr. Harle replied.

22. The Tribunal then said that because the hearing was going ahead, it wanted some clarity from the parties as to their positions and the issues they wanted the Tribunal to consider. It was suggested to the parties that the only real issues as presented in the evidence and submissions appeared to be (a) whether the letters of the 9th December 2013 and 18th December 2014 had been sent or received, (b) whether the enclosures were sent, (c) whether the letter and enclosures amounted to an exemption to the 18 month rule as set out in section 20B of the 1985 Act and (d) whether the accounts had been provided 'as soon as practicable after each accounting year' in compliance with the terms of the lease.

23. The parties agreed but Mr. Harle also said that he had not considered the last point. Mr. Harle and Mr. Harrison were asked whether he had any further submissions to make on the points mentioned. They said that they had nothing further to say.

Discussion

24. Of the Applicant's allegation that he has been charged the wrong percentage of service charges, the only mention of this is in the application form. His case in the bundle does not pursue this point and does not seek to say that the

Respondent is wrong in pointing out the terms of the lease as stated above.

25. This is a new estate. The Applicant says that there were about 140 flats in June 2013 and that there are now about 400. The finances of a new estate of this size are always, in the Tribunal's experience, going to be complex. Where there are a number of buildings, for example, there will be fire insurance on those buildings erected but not for those which are not. There will not be maintenance charges for those parts of the estate which have not yet been developed. Accordingly, the percentages set out in the lease are unlikely to be precisely adhered to until the whole estate has been completed.

26. Thus, as the Applicant has not put forward any forensic analysis, suggestion or hypothesis as to what percentage he should have been charged, it is impossible for the Tribunal to do anything other than accept that the Respondent has made appropriate adjustments.

27. As to the 18 month rule, the only question for the Tribunal to determine is whether the exemption applies. For that, the Tribunal needs to determine whether, on the balance of probabilities, the letters of the 9th December 2013 and 18th December 2014 were sent to the Applicant and, if they were, whether they do invoke the exemption to the 18 month rule.

28. This is an extremely important section in the 1985 Act. If the exemption does not apply, then the service charges in question are simply not payable. As Etherton J. said in the **Gilje** case, the purpose of the section is to avoid tenants having to pay service charges incurred more than 18 months prior to the demand when they have not been 'sufficiently warned' what to budget for i.e. set aside money to pay. This comment appears to be *obiter* and therefore not binding but, nevertheless, is persuasive and adopted by this Tribunal.

29. The Respondent's managing agent has produced an internal bookkeeping record purporting to show that a 'section 20B Notice June 2013' was created on the 9th December 2013 with a 'postroom date' of 11th December 2013. It then shows that a 'section 8 – expenditure list Jun 2014' was created on 10th December 2014 with a 'postroom date' of 18th December 2014'. There is no evidence from anyone who either created that record or performed the functions stated. It is also stated that John Hunter, a director of the Respondent, reported at the AGM of the company on 12th July 2016 that he and the other directors "*had received notice of the balancing charges as well as other owners in the block*".

30. There is a note from Mr. Hunter in the bundle dated 28th July 2016 which gives the reason for the delay in the provision of final accounts for the years in question i.e. that they were being challenged by the directors of the Respondent. No details are given and no other reason is given for the delay. This comment seems to be at odds with the e-mail of the 4th March 2016 from Jennifer Viccars referred to above.

31. In any event, there seems to be some confusion in the minds of the Respondent

and/or the managing agents as to what the exemption in section 20B of the 1985 Act actually is. The purpose is to tell tenants that a final account can't be prepared but the actual expenditure was £x and the tenant will be required to contribute to that. What they have actually done, on their own best case, is give the tenant notice of expenditure and then tell the tenant that they do not know whether such tenant will have to pay anything towards such charges or not.

32. According to their evidence from Mary-Anne Bowring, the managing director of the managing agent, there is a complicated procedure, whilst the development is continuing, for working out what is payable by individual leaseholders taking into account the number of days in the year the property has existed and how many properties were and are on the site. All this information must have been known to the Respondent at the end of the accounting years in question. Ms. Bowring then says, in paragraph 9 of her statement that the 'site Directors' of the Respondent "*were aware of the accounting issues and spent over 18 months agreeing/amending the accounts with Weston Homes, Ringley and Rouse Auditors*". She does not explain what the accounting 'issues' are or were.

33. As an additional issue, in considering the terms of the lease, are service charge accounts produced in April 2016, for the years ending 30th June 2013 and 30th June 2014 prepared "*as soon as practicable after*" the end of the accounting year? If not, then the terms of the lease will not have been complied with.

Conclusions

34. Taking the evidence of the Applicant and the 9 other leaseholders into account, the Tribunal determines (a) that on the balance of probabilities, the letters of the 9th December 2013 and 18th December 2014 were not sent to them, (b) that even if they were, the clear statement in the questions and answers that nothing may be payable takes any list of expenditure outside the protection of section 20B of the 1985 Act because the letter and enclosures are not a notification to the tenant "*that he would subsequently be* ***required*** *under the terms of his lease to contribute to them by the payment of a service charge*" (our emphasis). All the letters do is to say, in effect, 'here is a list of expenses incurred and we may or may not ask you to pay something towards them in due course and we will keep you appraised'.

35. Further, there is absolutely no evidence produced by the Respondent to provide a plausible and reasonable explanation as to why the accounts required by the lease should take so long to be produced. Thus, the Tribunal concludes that they have not been produced "*as soon as practicable after*" the end of the accounting years in question. As a result, the service charge provisions in the lease have not been complied with and the extra amounts are therefore not payable in any event. This is a new matter raised by the Tribunal which has to consider 'payability' in the round. The point has been put to the parties for comment.

Costs and fees

36. The Tribunal finds that it is just and equitable to make an order that the Respondent shall not be able to add its costs of representation within these

proceedings to any future service charge demand.

37. Further, the Tribunal considers it would be unreasonable for the Applicant to have to bear the cost of the fees paid to the Tribunal of £90 and £190 for the application and hearing respectively and an order is made for the Respondent to reimburse the Applicant those amounts within 28 days from the date of this decision.

The future

38. The Tribunal noted many comments made in the papers about what service charges should be as compared with previous years. If representations were made to the leaseholders before they entered into their respective long leases which have not been complied with, there may be a contractual matter to be resolved. In south Essex, one could well expect service charges in a block such as this, in a town centre location close to a main line railway station to London, to be close to about £1,000 per annum for a flat of this size to take into account the need to create a reasonably sized reserve.

39. There are also comments suggesting that the Respondent or its managing agents must provide details of charges with supporting documents. A leaseholder is entitled to ask for facilities to inspect all invoices and documentary evidence to support a service charge demand and then to ask for facilities to make copies of any such documents at the leaseholder's expense. There is no requirement for a landlord or management company to provide copies of such documents on demand.

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Bruce Edgington
Regional Judge
29th 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.