11423

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/LIS/2015/0037
Property	:	17b Tangier Road, Portsmouth, Hampshire P)3 6JG
Applicant	:	Ms Claire Ross as executrix of the estate of Ian Brison deceased
Representative	:	Mr M Colwell and Mr Childs
Respondent	:	Mr S Slater
Representative	:	Mr N Faulkner of Alexander Faulkner Partnership (formerly of Stiles Harold Williams)
Type of Application	:	Liability to pay service charges
Tribunal Member(s)	:	Judge D Agnew Mr D Banfield FRICS
Date and venue of CMH	:	
Date of Decision	:	27th January 2016

DETERMINATION

Background

1. By an application dated 2nd July 2015 Mr Colwell on behalf of Claire Ross, the executrix of Ian Brison deceased sought a determination as to the liability to pay service charges for the service charge years 2006/7 to 2013/14 in respect of both 17a and 17b Tangier Road, Portsmouth PO3 6JG. HBOS (Halifax Bank of Scotland) were also named on the Application form as an Applicant but the application form was not signed on behalf of HBOS and no details as to HBOS's address were included on the form. The Directions have not therefore been served on HBOS and are not represented in these proceedings.

2. At a Case Management Hearing on 19th August 2015 Mr Colwell agreed that, following an earlier decision of the Tribunal in respect of 17a Tangier Road for the service charge years 2013/14 and 2014/15 (a case brought by the current leasehold owner of Flat 17a, Mr Childs) once an overpayment of £92 had been repaid to Mr Brison's estate the application in respect of Flat 17a would be satisfied and the case could proceed in respect of Flat 17b alone.

3. At the hearing on 19th January 2016, however, there was a dispute as to whether or not the aforesaid £92 had in fact been repaid but it was agreed that this was a matter for enforcement and not one for determination by the Tribunal. More importantly, however, it transpired during the course of the hearing that Mr Colwell had been mistaken to say that the case in respect of Flat 17a would be settled by the payment of £92. There remained the question as to the service charge liability of Mr Brison during the period of his ownership since 2006/7 and the alleged payment to Mr Slater by HBOS in respect of alleged arrears of service charges which, it was alleged, had been paid wrongly.

4. There were several difficulties with re-opening matters as far as Flat 17a is concerned. First, as far as the Tribunal and the Respondent was concerned, the case was proceeding in respect of Flat 17b alone and so the Respondent had prepared his case on that basis as, indeed, had Mr Colwell. Documents were produced at the hearing by Mr Childs purporting to show that a sum of over £8,000 had been sought by TNT solicitors in respect of alleged arrears of service charges and ground rent in respect of Flat 17a but there was no evidence as to whether the money had been paid or for whom TNT were acting and, if payment had been made, who had suffered as a result. In all the circumstances the Tribunal considered that it would be wrong to proceed to hear any case in respect of Flat 17a as part of the current determination. Once the parties have received this decision in respect of Flat 17b they will be able to take stock and consider their respective positions. If they cannot come to any agreement as to Flat 17a they may need to take legal advice to

consider whether further proceedings should be taken in regard to Flat 17a and by whom and whether those proceedings should be before this Tribunal or the County Court in the nature of a restitutionary claim. As will be made clear below, the Tribunal has no power to order repayments of overpaid service charges and to enforce such an order. It can only determine what is owed by way of service charge and by whom. The Tribunal can determine what was properly due and whether there has been an overpayment but that is as far as it can take matters.

Agreed facts

5. At the outset of the hearing the parties both agreed the following facts/statements which had been identified by the Tribunal from the papers submitted to it in accordance with Directions and sent to the parties in advance of the hearing so that they would have prior notification of the matters of which the Tribunal would be seeking confirmation. The agreed facts/statements are as follows:-

   (a) Mr Brison became lessee of Flat 17b on 3.4.98 and his title was registered on 14.4.98.

   (b) He died on 5.12.13 and Claire Ross became executrix on 7.10.14

   (c) Mr Slater became lessee of Flat 17c on 5.1.07 and his title was registered on 29.1.07.

   (d) In 1998 the freeholder was 21B Limited.

   (e) Mr Brison personally demanded service charges and ground rent from Mr Slater on 21.3.07.

   (f) Notice of First Refusal dated 23.4.12 for the purchase of the freehold was served on Mr and Mrs Slater on behalf of Paul Harvey as landlord. A subsequent notice was purported to be served on Mr Brison on behalf of Portsmouth Property Services Limited on 14.9.12.

   (g) Mr Slater took a transfer of the freehold (he says from Tangier Management Limited) on 17.10.12 and his title was registered on 29.1.13.

   (h) £11,500 was paid by The Mortgage Works (Mr Brison's mortgagee) to Bramsdon & Childs (Mr Slater's solicitors) on 4.12.13 in response to what was purported to be a section 146 notice.

   (i) There had been no prior court proceedings.

(j) There is no evidence of any service charge demand being sent by the landlord to Mr Brison with regard to Flat 17b from 2006/7 to 2011/12.

(k) The first document that might be said to be a demand for payment of service charges for the period 2006/7 onwards is a letter to Mr Brison's mortgage company dated 25th March 2013 enclosing the section 146 notice referred to at point 8 above.

(l) Any expenditure incurred before 25th September 2011 is more than 18 months prior to 25th March 2013.

(m) No demands for any period in question complied with s 48 (1) Landlord and Tenant Act 1987 (name and address of landlord) or s21B Landlord and Tenant Act 1985(summary of rights and obligations).

(n). The invoices addressed to Mr Brison for works carried out by or on behalf of Mr Slater whilst Mr Slater was a tenant were for the landlord to include in service charge demands, if appropriate, but which the landlord did not do.

(o) Mr Slater had no agreement with the other lessees direct concerning recovery of the cost of works he undertook or procured and there is no evidence that he had such an agreement with Mr Brison.

(p) The current application does not extend to consideration of the 2014/15 service charge year.

(q) The Applicant accepts the ruling of the previous Tribunal concerning Flat 17a applies equally to Flat 17b for the 2013/14 service charge year.

(r) That leaves 2012/13. The "demand" is for £1390. It is for a budget figure as in the previous and subsequent year. There is no "service charge apportionment" document for this year in the papers.

(s) There is no statutory compliant demand for 2012/13.

(t) The only invoices in the papers for 2012/13 are:-

a. CCJ Management for clearing dog waste £3920 dated 30.3.12

b. The Joiners Shop to attend to roof £520 September 2012

During the course of the hearing a third item of expenditure by the landlord for 2012/13 was added to this list, namely the buildings insurance cost of £543.70. This was in line with the figure approved by the previous Tribunal for the 2013/14 year of £566.90 and was not disputed by the Applicant.

The Applicant's case

6. The Applicant's case in a nutshell is that none of the service charges claimed for the years 2006/7 to 2013/14 were properly owed by Mr Brison and the payment of £11,500 made by Mr Brison's mortgagee in or about March 2013 was made in error. The reason why the service charges for this period are not payable is that there has never been a proper demand made of Mr Brison, the lessee of Flat 17b until his death on 5th December 2013 or of his estate since his death. There is no evidence that any demands at all were made between 2006 and 2013. There have never been any demands complying with sections 48(1) of the Landlord and Tenant Act 1987 or section 21B of the Landlord and Tenant Act 1985.

7. As far as the year 2013/14 is concerned the Applicant is content to rely on the previous Tribunal's determination as to what is payable if or when the statutory deficiencies identified both in paragraph 6 above and in the earlier Tribunal's determination of 12th June 2015 are rectified.

8. The Applicant states that it is not now possible to rectify the statutory deficiencies with regard to expenditure incurred more than 18 months prior to 25th March 2013 (i.e. 25th September 2011) in accordance with section 20B of the Landlord and Tenant Act 1985. If the Respondent does therefore try to rectify the statutory deficiencies identified above this may only be for expenditure incurred in the last six months of the 2011/12 service charge year and for the whole of 2012/13. The Applicant's case, however, is that, apart from the buildings insurance, the landlord, whoever it was during this period, did not incur the costs that have been budgeted for. If any works needed to be done at the property, the tenants would do it themselves or pay for the costs between themselves as they went along. As for insurance, Mr Brison effected this and documents showing this were contained in the hearing bundle. Indeed, he continued to pay the buildings insurance premium even after Mr Slater purchased the freehold. The Applicant accepted that under the lease it was Mr Slater's duty to insure the building once he acquired the freehold and that Mr Brison's estate was not able to reclaim the premiums paid erroneously by Mr Brison.

9. The Applicant considered that Mr Slater was not entitled for all the reasons stated above, to serve a section 146 notice on Mr Brison and seek payment from his mortgagee and that the £11,500 paid to the Respondent by the mortgagee should be repaid.

10. The Applicant's application form also contained an application under section 20C of the Landlord and Tenant Act 1985 for an order that the Respondent should not be able to add the costs of these Tribunal proceedings onto any future service charges.

The Respondent's case

11. The Respondent explained that Mr Brison was Company Secretary of 21B Limited, the freeholder at the time that the leases of both Flat 17a and 17b were granted to him. A Mr Paul Harvey was a Director of 21B Limited at that time and he and Mr Brison were Directors in at least four other companies. It seems that Mr Brison very much controlled 15-17 Tangier Road and it was probably for this reason that no service charge demands were ever sent to him in his capacity as lessee, as far as the Respondent is aware until 25th March 2013, after Mr Slater had acquired the freehold and the section 146 notice had been served.

12. Mr Faulkner on behalf of Mr Slater accepted that there has never been a demand for service charge in respect of Flat 17b which complied with the statutory requirements of section 48(1) of the Landlord and Tenant Act 1987 or section 21B of the Landlord and Tenant act 1985. Whilst it might be possible to rectify those statutory deficiencies with regard to some of the past years by serving compliant demands he conceded that this could not be done for any expenditure incurred prior to September 2011. As far as the 2012/13 year is concerned he asked the Tribunal to follow the findings of the previous Tribunal so that if the statutory deficiencies are remedied then the determination of the Tribunal as to the reasonableness of the demands will have been determined thus avoiding the necessity of either party having to make a fresh application to the Tribunal.

The Law

13. By section 27A(4) of the Landlord and Tenant Act 1985 ("the Act) an application may be made to a [First-tier Tribunal (Property Chamber)] for a determination as to 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.

14. By section 19 of the Act service charges are only payable to the extent that they are reasonably incurred: in other words, that the amount is reasonable.

15. By section 48(1) of the Landlord and Tenant Act 1987:-
"A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at

which notices (including notices in proceedings) may be served on him by the tenant and by subsection (2) of that section:-
"Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall..... be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

16. By section 21B(1) of the Landlord and Tenant Act 1985:-
"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges."
There is a prescribed form of notice specified in the Service Charges Summary of Rights and Obligations....)(England) Regulations 2007 (SI 2007/1257).

17. By section 20B(1) of the Landlord and Tenant Act 1985:-
"If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than eighteen months before a demand for payment of the service charge is served on the tenant, then.... The tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

18. Section 20C of the Landlord and Tenant Act 1985 states that 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 [First-tier Tribunal (Property Chamber] ....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.

The Tribunal's determination

19. The first point to make clear is that this determination is not concerned in any way with ground rent as the Tribunal has no jurisdiction to make any determination in respect thereof.

20. The Respondent has conceded that there is no evidence that service charge demands were served upon Mr Brison prior to 25th March 2013 and that as a consequence of section 20B of the 1985 Act any service charge demands for expenditure incurred prior to September 2011 cannot now be served in a compliant form and the amount recovered from Mr Brison's estate as service charges.

21. It must follow that if no compliant service charge demands had been made prior to 25th March 2013 the landlord, whoever it might have been at the time, was not entitled to serve a section

146 notice demanding payment to avoid forfeiture of the lease and claim the service charge element of the sum of £11,500 sought from Mr Brison's mortgagee and paid by them to Mr Slater's solicitors. The Tribunal has no jurisdiction, however, to order the repayment of this sum paid in error. That would be a matter for the County Court if the parties cannot agree the consequences of this determination.

22. The Tribunal was asked to determine the amount that would be payable by Mr Brison's estate if the demand for 2012/13 is now made correctly in order to avoid the necessity of either party re-applying for a determination once this is done. In that regard, the insurance premium of £543.70 is reasonable, in line with the premiums previously determined as reasonable by the Tribunal in June 2015 for the two subsequent years. The only invoices for expenditure during this year are those identified at paragraph 5.20 above.

23. With regard to the CCJ Management invoice dated 30th March 2012 for clearing dog waste from the garden (£70 per week for 52 weeks) is an invoice issued by Mr Slater's own firm. It is addressed to Mr Brison. However, as Mr Faulkner conceded there is no evidence that there was any agreement between Mr Brison and Mr Slater for Mr Slater or his firm to carry out any work at the property. Indeed, Mr Slater says in his statement of case that "Mr Brison made no attempt to manage the property, address disputes, control his own sub-tenants or even recover the insurance for the property....Therefore, I as the tenant had to undertake various works over a period of years including cleaning, debris removal, general maintenance and repairs..... The general maintenance costs incurred to the service charge account were raised as invoices at the time to the landlord, Mr Brison ... it was for that landlord to recover those from the leaseholders within 18 months.....It is acknowledged that the then landlord did not raise demands at the time."

24. The quotations in paragraph 23 reveal Mr Slater's misunderstanding of his position with regard to this item and other items of expenditure he was hoping to recover from the other lessees as service charges. He has undertaken, as tenant, works which were the responsibility of the landlord to carry out. Without any request from the landlord for him to do so he has carried out the work and incurred cost gratuitously. Only the landlord can recover his costs from the other lessees in accordance with the covenants in the lease. If indeed it is the case that Mr Slater sent to Mr Brison an invoice for the various items of work carried out by him or his firm evidently Mr Brison did not pay them. He has not incurred a cost that he is able to pass on as service charge unless there was some form of contract between him and Mr Slater and it has been conceded that there was not. Indeed, it is not clear that Mr Brison personally was the

landlord. He was certainly not the owner of the freehold in 1998 when the leases were granted and it would appear that he was not the freeholder in April or September 2012 when the section 5 notices offering first refusal for the purchase of the freehold were served. All the invoices issued to Mr Brison by Mr Slater or his firm, in particular the CCJ Management invoice of 30th March 2012 are therefore not recoverable from the other lessees as service charges. Mr Faulkner has stated that if they cannot be recovered from the other lessees as service charges then Mr Slater may seek to recover the same from Mr Brison's estate direct. The Tribunal makes no comment in that regard as it is not a matter within its jurisdiction suffice it to say that Mr Slater would be well advised to obtain legal advice before doing so.

25. The only other invoice for expenditure during the 2012/13 service charge year is the Joiner's Shop (another Mr Slater firm) invoice dated "September 2012" for £520 for removal of debris from the roof. This is an invoice addressed to Mr and Mrs Slater. Mr Slater had not acquired the freehold by this date. It is not an expense incurred by the landlord and is not therefore recoverable from the lessees by way of service charge. The same applies to the second half of the 2011/12 service charge year. The only supporting invoices being those of 21st November 2011 from David Stocker, electrician, addressed to Mr Slater for £60 and another Joiner's Shop invoice for £520 for clearing debris from the roof dated "October 2011". For the same reasons as for the 2012/13 invoices, these are not recoverable as service charge items from the other lessees

26. With regard to the document headed "Service Charge Apportionment" for the year ended 25th March 2013 there is no evidence that any of the headings of expenditure set out were incurred and are therefore disallowed with the exception of £543.70 for buildings insurance as referred to in paragraph 22 above. The same is the case for the Service Charge Apportionment document for the year ended 25th March 2012 except in this case the buildings insurance will not be claimable as Mr Slater was not yet the freeholder and Mr Brison had effected the buildings insurance for that year.

27. With regard to the section 20C application as the Applicant has substantially succeeded in his application the Tribunal is minded to make such an order. However, as the tribunal was not addressed by the parties on this point at the hearing the Tribunal gives the Respondent 14 days in which to submit any representations he may have in respect of the making of a section 20C order. If no such representations are received within 14 days of this decision being sent out to the parties the section 20C order will become effective.

Summary

28. As matters stand at present, the Respondent is not and never has been entitled to claim service charges from Mr Brison for any period since 2006. It is a matter for the Applicant as to what steps she may take to recover monies to which Mr Slater was not entitled as a result of this determination. Similarly, it is a matter for Mr Slater to take advice as to whether as a defence and counterclaim to any proceedings brought by Mr Brison's estate for the recovery of the monies paid out by Mr Brison's mortgagee he may claim that he was entitled to be re-imbursed by Mr Brison. The Respondent may seek to remedy the deficiencies in his service charge demands for the second half of 2011/12 and 2012/13 but the amount that this Tribunal has determined is a reasonable amount to be paid for those years is nothing for 2011/12 and £543.70 for insurance in 2012/13. the 2013/14 year service charge has already been determined by the previous Tribunal and both parties have accepted that determination as applicable to Flat 17b. The Tribunal is minded to make a section 20C order unless written representations to the contrary are received from the Respondent within 14 days of the date this determination is sent to the parties.

29. As a final general comment, the Tribunal would urge the parties to try to come to some settlement of all outstanding matters based on this determination. It was perhaps surprising that it was not until the actual hearing of this case that the Respondent made significant concessions, particularly bearing in mind the determination that was made by a differently constituted Tribunal in June 2015 on Mr Childs' application when some of the same issues with regard to the validity of service charge demands were addressed. The Tribunal expresses the hope that with this further determination and perhaps with the input of some legal advice on both sides protracted and potentially expensive County Court litigation might be avoided.

Dated the 27th January 2016

Judge D. Agnew (Chairman).

APPEALS

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.