12062

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AC/LSC/2016/0346**
Property	:	**2 Tudor Gables, Birkbeck Road, London NW7 4BN**
Applicant	:	**Mr S Freeman**
Representative	:	**None**
Respondent	:	**Tudor Gables Freehold Limited**
Representative	:	**None**
Type of application	:	**For the determination of the reasonableness and liability to pay a service charge**
Tribunal members	:	**Mr N Martindale FRICS** **Mr L Packer**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**22 November 2016**

DECISION

Decision

(1) The Tribunal determines that a sum of £3,000 is payable by the Applicant to the Respondent, in respect of the service charge year 2016, as a reasonable advance contribution towards the monies required to be collected by the landlord as service charge in preparation for funding various works intended to be carried by the landlord in 2016/17 and in following years, to the common parts of the building and/ or estate within which the property is located.

(2) The Tribunal declines to make an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from attempting to recover its costs arising from this application to the Tribunal, from leaseholders through the lease of the property.

(3) The Tribunal declines to make an order for reimbursement of application fees.

Application and Directions

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 advance, in the calendar and service charge year of 2016. The application was received on 8 September 2016.

2. Directions were issued from this Tribunal, by Judge Carr, on 22 September 2016. The relevant legal provisions are set out in the Appendix to this decision.

Hearing

3. Although the Directions provided for either party to request a hearing, neither did so. The case was dealt with on consideration of the papers received from both parties, only.

Background

4. The property which is the subject of this application is a flat, located in a large post-war block of flats, situated in Birkbeck Road, London NW7 4BN.

5. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

7. The Respondent Landlord is a leaseholders' management company. The Applicant does not say whether he is a shareholder.

Issues

8. The papers received from each party very briefly set out the heads of service charge and the amounts claimed. The Applicant and Respondent identified the relevant issues for determination as follows: The payability and/or reasonableness of service charges to the sum of £3000 for the single year of 2016 as advance payment towards major works planned to the common parts within which the property is located.

9. The separate issue raised by the Applicant in their application form concerning a "Charge of £95 for rubbish removal from my flat" was settled by the parties prior to the hearing.

Applicant's Case

10. The Applicant admitted that his lease provided for a reserve fund but queried the amount (£3,000) as "wholly excessive" at "300% of the annual service charge." He also queried the need for the works; contended that the proposed roof and other works 'are all one-off jobs' and as such could not be covered by the sinking fund provisions of his lease; and contended that even if they were necessary he was only liable for the cost of repairs, not of improvements.

11. The Applicant whilst acknowledging that a consultation process under S20 of the Landlord and Tenant Act 1985 ('the Act') had been begun by the landlord some 8 months prior, there had been no cost estimates since or apparently at all. He also argued that the landlord had ignored all observations and declined to consult or engage in discussion of the proposed major works.

Respondents Case

12. In a letter dated 5 April 2016, to all leaseholders (including the Applicant) sent by MLM Property Management on behalf of the Respondent, the landlord set out the case for works to the common parts as their approach to the requirements of the first stage of the statutory consultation process under S.20 and 20ZA of the Act. The letter referred to proposed works to stairs, paving, driveway, roof and associated external repairs.

13. The Respondents' estimated works budget was £80,000; and there being very low existing reserves, they considered it reasonable to seek advance contributions of £3000 in 2016/17 (with prospectively a further sum in 2017/18) the two prior service charge years) so as to accumulate sufficient funds to pay for the works thereafter. The figure of £80,000 was the result of a report by a Chartered Surveyor on the building, concerning the extent and nature or defects; and the likely extent and cost of works required, including professional fees and VAT. The Respondents, following discussion at a Directors' meeting in 2015, decided to collect £30,000 (10 flats each leaseholder paying 1/10th or £3000) as advance payments in 2016/17.

14. The Respondents referred to the First Schedule of the lease, which they stated entitled them to create and maintain a reserve fund for the purpose stated.

15. The First Schedule, paragraph E reads "...also such sums reasonable sums of money set aside to meet future expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the said term or otherwise including such a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessors or its Accountants or Managing Agents (as the case may be) may in their discretion allocated to the year in question as being fair and reasonable in the circumstances."

16. The First Schedule paragraph F reads "The Lessee shall if required by the Lessors with every payment of rent reserved hereunder pay to the Lessors such sum in advance and on account of the service charge as the Lessors or their Accountants or Managing Agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment..."

Tribunal's decision

17. The Tribunal has read and considered the evidence and submissions from the parties and considered the documents provided, in particular the First Schedule to the sample lease supplied. The issue before the Tribunal is whether or not the lease allows the landlord to bill leaseholders in advance for sums by way of service charge contributions towards a fund for the future estimated costs of works. The Tribunal concludes that the landlord is so entitled.

18. The Tribunal notes, as the Applicant contends, that the contribution sought is greater than recent service charges. But it is not unusual or surprising that major repairs and maintenance works will sometimes cost more than routine services, particularly for a simple property. The

Tribunal determines that, in the context of the scale of prospective works totalling up to £80,000, a sum of £3,000 is payable by the Applicant to the Respondent, in respect of the service charge year 2016, as a reasonable advance contribution towards the monies required to be collected by the landlord as service charge in preparation for funding various works described as intended to be carried by the landlord in 2016/17 and in following years, to the common parts of the building and/ or estate within which the property is located.

19. The Tribunal is satisfied that the works envisaged are matters of repair and maintenance rather than improvements, and so has not needed to consider whether the lease provides for improvements.

20. The Tribunal is also satisfied that the works envisaged fall within the intention and scope of the provisions of the lease's First Schedule paragraph E for setting aside money for future works, notwithstanding that roof replacement is only rarely required.

21. The Tribunal makes no determination as to whether or not the statutory requirements for consultation for major works have been met here, since the only evidence provided is the Landlord's letter of 5 April 2016, which is only the first stage in the consultation process,

22. The validity of the consultation process, the extent, need, appropriateness of the works proposed, their cost; and/or the payability and/or reasonableness of service charge sums for costs *actually* incurred by the landlord all remain separate matters some or all of which are capable of subsequent referral or referrals back to the Tribunal for determination at a later date.

23. The Applicant has not made the case for his objection to the reasonableness of the Landlord's demand for an advance contribution towards the proposed works, and the Tribunal declines to make an order for reimbursement of his fees.

Name: Neil Martindale Date: 22 November 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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).