11483

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LAC/2016/0003**
Property	:	**First Floor Flat, 85 Oxford Gardens, London W10 5UL**
Applicants	:	**Mrs Rachel Claire Amott (1)** **Mr James Alexander Amott (2)**
Representative	:	**Mr D Waller (IPR Consultancy Services)**
Respondent	:	**Mr Thilo Sautter**
Representative	:	**Healys LLP**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mrs Sarah Redmond MRICS (Valuer Member)**
Date and venue of paper determination	:	**31 March 2016** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**19th April 2016**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the amount payable by the Applicants for management fees in connection with the First Floor Flat at 85 Oxford Gardens, London W10 5UL ('the Flat'), for the period 30 September 2006 to 30 September, is £Nil.

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ('the 1985 Act') so that none of the Respondent's costs of these tribunal proceedings may be passed to the Applicants through any service charge.

(3) The tribunal determines that the Respondent shall pay the Applicants the sum of £65 within 28 days of this Decision, in reimbursement of the tribunal fees paid by the Applicants.

The application

1. On 20 January 2016 the tribunal received an application under schedule 11 of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'), relating to "*administration*" fees charged for Flat. The fees in question spanned the period 30 September 2006 to 30 September 2015.

2. Directions were issued on 27 January 2016. These included provision for the application be determined on paper, without an oral hearing. None of the parties has objected to this or requested an oral hearing. The paper determination took place on 31 March 2016.

3. At paragraph 2 of the directions, the tribunal gave the Applicants permission to amend the application to seek a determination under section 27A of the 1985 Act, as to whether service charges are payable. The second sentence read:

   "The applicant refers to an item claimed within the maintenance charge as an "administration charge", but it might more properly be understood to be a management fee apportioned between the flats."

4. In their statement of case dated 09 February 2016 the Applicants made an application to amend the schedule 11 application to seek a determination under section 27A of the 1985 Act. The disputed fees are management fees charged by the Respondent and are service charges for the purposes of section 18 of the 1985 Act. This is accepted by the Respondent.

5. The relevant legal provisions are set out in the Appendix to this decision.

The background

6. The Respondent is the freeholder of 85 Oxford Gardens, London W10 5UL ('the Property), which comprises four flats. The Respondent also owns the Garden, Ground and Top Floor Flats at the Property. The First Applicant was the sole leaseholder of the Flat, which is on the first floor of the Property, between August 2006 and June 2015. It was transferred into the joint names of both Applicants on 25 June 2015.

7. The Applicants hold a long lease of the Flat, which requires the Lessor to provide services and the Lessee to contribute towards their costs by way of a variable service charge. The specific provisions of the lease are referred to below, where appropriate.

The lease

8. The original lease was granted by Stanislaw Czyzyk ('Lessor') to Alexander Robert George Morrison and Dinah Morrison ('Lessee') on 31 July 1984 for a term of 100 year from 23 March 1984. The Lessee's share of the Maintenance Fund is defined at paragraph 9 of the particulars as:

"Twenty five per centum (25%) except where otherwise provided herein".

9. Various definitions are to be found in the first schedule, including:

"(ix) "The Maintenance Year" means a period commencing on the Thirtieth day of September in each year and ending on the Twenty ninth day of September in the following year"

10. The Lessee's covenants are to be found in the fifth schedule and include, at paragraph 2 of part I:

"To pay to the Lessor a Maintenance charge being that percentage specified in Paragraph 9 of the Particulars of the expenses which the Lessor shall in relation to the Property reasonably and properly incur in each Maintenance Year and which are authorised by the Eighth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such Maintenance Charge to be determined by the Lessor's Managing Agent or Accountant acting as an expert and not as an arbitrator as soon as conveniently possible after the expiry of each Maintenance Year...."

11. The costs and expenses that can be charged to the Maintenance Fund are detailed in the eighth schedule. The preamble to that schedule opens with the following wording:

"There shall be charged upon the Maintenance Fund such of the following costs and expenses as may from time to time be incurred in connection with the Property PROVIDED that nothing in this Schedule shall impose upon the Lessor any obligation not contained elsewhere in this Lease to provide any of the services herein mentioned it being the intention of the parties that the Lessor shall have power to incur such expenses if he considers the same are necessary or desirable in the general interests of the lessees or occupiers of the Property or in the interests of good estate management..."

12. These costs and expenses include:

"(7) All legal and proper costs incurred by the Lessor:

(a) in the running and management of the Property and in the enforcement of the covenants on the part of the Lessee and of the lessees or Other Demised Parts of the Property and the conditions and regulations contained in this Lease and the leases granted of the Other Demised Parts of the Property insofar as the costs of enforcement are not recovered from the lessee in breach and

(b) in making such applications and representations and taking such action as the Lessor shall reasonably think necessary in respect of any notice or order of proposal for a notice or order served under any statute or order or regulation or bye-law on the Lessee or any underlessee of any Other Demised Parts of the Property or on the Lessor in respect of the Property or all or any parts thereof"

13. The original lease was extended by way of a new lease granted by the Respondent to the First Applicant under section 56 of the Leasehold Reform, Housing and Urban Development Act 1993 on 25 June 2015. This extended the term to 190 years from 23 March 1984 and reduced the ground rent to a peppercorn. It did not alter the service charge provisions in the original lease.

The issues

14. The issues to be determined by the tribunal are:

- Whether the Respondent's management fees are payable for the period 31 March 2006 to 30 September 2015;

- Whether an order should be made under section 20C of the 1985 Act; and

- Whether an order for reimbursement of application/hearing fees should be made.

15. The tribunal were supplied with a bundle of documents containing copies of the application and supporting papers, the directions and the parties' statements of case. Having considered all of the documents provided, the tribunal has made the determination set out below.

Management fees for the period 30 September 2006 to 30 September 2015

16. The Respondent relies upon six-monthly service charge accounts, even though the original lease provides for annual accounts. Management fees are claimed, under the heading "*administration*", at the rate of £50 per six months for period 30 September 2006 to 30 September 2008. From 30 September 2008 onwards the management fees are claimed at £100 per six months.

17. The Applicants' grounds for disputing the Respondent's management fees can be summarised as follows:

(a) They are not contractually recoverable under paragraph 1 of part I of the fifth schedule and paragraph 7(a) of the eighth schedule to the original lease. They are not "*expenses*" and are not "*proper costs incurred by the Lessor*". There are no external managing agents or accountants. Rather the Respondent is charging for managing the Building himself. The Applicants contend that he should not profit from the management arrangement and that he has not been physically paid for this service.

(b) There has been no determination of the "*Maintenance Charge*" by managing agents or an accountant, in accordance with paragraph (2) of part I of the fifth schedule.

(c) In the statement that accompanied the tribunal application, the Applicants also contended that the absence of accountant's certificates was a breach of section 21 of the 1985 Act, as amended by section 152 of the 2002 Act. They also referred to the requirement for any administration charge demand to be accompanied by a summary of rights and obligations, as required by section 158 and schedule 11(4)(1) of the 2002 Act. These points were not referred to in the Applicants' statement of case or reply and were not addressed in the Respondent's statement of case.

18. The Respondent's case can be summarised as follows:

(a) It is possible for a freehold company to recover *"in-house"* management fees (see ***Wembley National Stadium Limited v Wembley (London) Limited [2007] EWHC 756 (Ch),*** as approved by the Lands Tribunal in ***Norwich City Council v Marshall LRX/114/2007***). There is no reason to treat an individual freeholder differently.

(b) If the Respondent was forced to instruct external managing agents then there would be far higher management charges. A quotation of £3,000 plus VAT per annum, from Temple Property Services, was exhibited to the Respondent's statement of case. The Respondent contends that it would be entirely disproportionate, and an unreasonable cost, if it were forced to appoint external agents.

(c) Paragraph 2 of part I of the fifth schedule does not impose an obligation to appoint a managing agent or accountant. If neither has been appointed then the obligation for a determination of the "*Maintenance Charge*" does not arise. Further the Applicants' interpretation of this paragraph is inconsistent with the preamble to the eighth schedule.

The tribunal's decision

19. The tribunal disallows the disputed management fees in full.

Reasons for the tribunal's decision

20. The starting point is the terms of the lease. The service charge mechanism set out at paragraph (2) of part I of the fifth schedule specifically provides that the amount of the Maintenance Charge is "*to be determined by the Lessor's Managing Agent or Accountant*". There has been no such determination. However there is no obligation in the lease to appoint a managing agent or accountant.

21. Having regard to the Upper Tribunal's decision in ***Elysian Fields Management Company Limited v Nixon [2015] UKUT 0427(LC)*** the tribunal concluded that the requirement for a third party determination is not a condition precedent to recovery of the Maintenance Charge. Clearly it is desirable there should be a determination by an independent professional but this omission is is not fatal and does not bar the Respondent from recovering a Management Charge.

22. The Respondent is able to recover management fees charged by external agents but there is no express provision for him to charge a fee

for services he provides. He can recover "*legal and proper costs*" that he incurs in "*the running and management of the Property*", pursuant to paragraph (7)(a) of the eighth schedule to the lease. However it is only running/management costs that are recoverable, rather than a fixed management fee and it is for the Applicant to prove that such costs have been incurred.

23. The facts in question are quite different to those in ***Wembley National Stadium Limited*** and ***Norwich City Council***, where the landlords incurred expenses (salaries and other overheads) that were referable to the management of the properties. In this case, the Respondent has been managing the Property himself and charging a fixed fee as if he were a professional agent. The tribunal was not provided with details of any costs that he might have incurred whilst managing the Property, such as postage, telephone or other overheads. Rather the fees of £50 (and latterly £100), every six months, appears to have been plucked from thin air. In the absence of such details, these fees are not contractually recoverable.

24. Having concluded that the management fees are not contractually recoverable, it was unnecessary for the tribunal to go on and consider the two original arguments raised in the statement that accompanied the application. Further it appears the Applicants are no longer pursuing these arguments. However it is appropriate to point out that section 158 and schedule 11(4)(1) of the 2002 Act only apply to administration charges. There is a similar requirement for a summary of rights and obligations to accompany any service charge demand at section 21B of the 1985 Act. A failure to comply with this requirement entitles a leaseholder to withhold payment of the service charges in question.

25. It may be that the Respondent decides to appoint external managing agents in the light of this decision. If so, then the agents will inevitably charge more than the Respondent and their fees will be recoverable under the terms of the lease, subject to them being reasonably incurred. However that is not a valid reason to allow the Respondent's fees, in the absence of a contractual entitlement in the lease.

Application under s.20C and refund of fees

26. In the application form the Applicants requested an order under section 20C of the 1985 Act. Taking into account the determination above, the tribunal determines that it is just and equitable in the circumstances to make such an order, so that the Respondent may not pass any of its costs incurred in connection with these proceedings through the Applicant's service charge. The Applicants have been successful in that the management fees have been disallowed in full. It follows they should not have to pay any part of the Respondent's costs.

27. Paragraph 5 of the directions identified that one of the issues to be determined by the tribunal was whether an order for reimbursement of application/hearing fees should be made[1]. The Applicant paid a fee of £65 when submitting the original application. There was no hearing fee. as the application was decided on paper. Taking into account the determination above the tribunal orders the Respondent to refund the application fee of £65, within 28 days of the date of this decision. The Applicants were entirely justified in pursuing this application and it is just and equitable that the Respondent refunds this fee.

Name: Tribunal Judge Donegan **Date:** 19th April 2016

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

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).