12178

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2017/0016**
Property	:	**GFF 59 Heygate Avenue, Southend-on-Sea, SS1 2AN**
Applicant	:	**Martin A. Myers Self representing**
Respondents Represented by	:	**Regisport Properties Ltd. Heidi Slassor – lay representative**
Date of Application	:	**4th January 2017**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Roland Thomas MRICS Chris Gowman BSc MCIEH MCMI**
Date and place of Hearing	:	**15th May 2017 at Southend Magistrates' Court, 80 Victoria Avenue, Southend-on-Sea, SS2 6EU**

DECISION

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1. The Tribunal's determination of the service charges challenged by the Applicant in his application is as follows:

Year commencing	Amount(£)	Determination
1/7/06	587	£587 is payable
1/7/07	155	£155 is payable
1/7/08	314	£314 is payable
1/7/09	99	nil is payable
1/7/10	466	£125.02 is payable
1/7/11	592	nil is payable
1/7/12	400	nil is payable
1/7/13	400	nil is payable
1/7/14	400	nil is payable
1/7/15	400	nil is payable
1/7/16	400	nil is payable
	4,213	£1,181.02 is payable

2. As the service charge account from Countrywide set out at page 26 in the Respondent's bundle indicates that there was a nil balance as at 30th June 2009, the Applicant's current liability for service charges would appear to be £125.02.

3. The Applicant's request for an order under section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from recovering the costs of its representation in these proceedings as part of any future service charge is granted.

4. The Applicants request for the fees paid in these proceedings to be reimbursed is granted in respect of the hearing fee of £200.00 but not in respect of the application fee. Thus, the Respondent should refund to the Applicant £200.00 less the outstanding service charges of £125.02 (i.e. a net figure of £74.98) within 28 days starting with the date of this decision.

Reasons

Introduction

5. In his application form, the Applicant challenges the above service charges and says:

> *"From the year 2006/07 the landlord imposed a very much higher service charge. I am only liable to pay 50% as there are only 2 flats in the house. I requested verification of the costs on several occasions since but the managing agent refuses to send these to me. I would like the tribunal to decide if the charges are reasonable & if I have to pay them as the agent will not provide verification. I have paid every year the ground rent & buildings insurance. For several years I was overcharged for buildings insurance. The agent refused my complaints until I obtained a comparable quote & then it was reduced. I suspect I am still paying an excessive amount for insurance but I am not questioning that here. Since I bought the property in approx. 1992 I have never requested the freeholder to do any works. I have decorated the lower half of the exterior & communal entrance hall at my expense. No material works have been done on the property. The bulk of the service charge is used to pay for the issue of 2 invoices per year."*

6. It seems that in recent times at least, the ground rent and insurance have been collected by the landlord direct, possibly through another agent. In respect of management, the managing agents appointed by the landlord were various including Countrywide until 21st March 2012. From then it has been Gateway Property Management Ltd.

The Lease

7. The bundle produced for the hearing included what appears to be a copy of the counterpart lease which is dated for the 29th November 1984 and is for a term of 99 years from 1st July 1984 with an initial ground rent of a peppercorn but which increases. The lease provides that the Respondent

shall insure the property and keep the building and grounds in repair. It can then recover one half of the cost of so doing from the leaseholder.

8. As to administration fees relating to litigation costs, there is no provision in the lease for them to be recovered in any situation other than for the purpose of or incidental to the preparation of a Notice under sections 146 of the **Law of Property Act 1925** i.e. for forfeiture. This clause (2(12)) specifically covers all expenses including solicitors' costs.

9. Clause 2(13) and the Fifth Schedule deal with service charges. The Respondent's covenant to keep the building and common parts in repair and maintained is subject to payment by the leaseholder of service charges. There are provisions for payment of service charges in advance, payment of interest on outstanding monies and the setting up of a sinking fund. An annual reconciliation service charge account must be prepared but it does not appear that this is a condition precedent for payment of service charges on account.

10. Part I, clause (v) of the Fifth Schedule allows the Respondent to charge fees for managing the property but "*such fees to be calculated as ten pounds per centum of the total annual service charges payable in respect of the building plus Value Added Tax at the prevailing rate per annum*".

The Law

11. 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'.

12. 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 to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

13. Section 27A of the 1985 Act states that no application may be made to this Tribunal in respect of any service charge which has been agreed or admitted by the tenant. Mere payment does not constitute agreement or admittance but could be interpreted as such, depending on the circumstances.

14. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."*

15. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"

16. In **Barrett v Robinson** [2014] UKUT 0322 (LC), the Upper Tribunal considered the question of when a section 146 clause, such as in this case, became operative. At paragraph 52, the Tribunal said:-

> *"Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not in fact contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs "*

17. This decision was referred to with approval by the Upper Tribunal in **Willens v Influential Consultants Ltd.** [2015] UKUT 0362 (LC). It must be remembered that if an amount is outstanding for service charges then it must be above the prescribed amount of £500 before a section 146 notice has any effect.

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

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

The Inspection

19. The members of the Tribunal inspected the property in the presence of Heidi Slassor and a colleague from the managing agents. The applicant did turn up after 10.00 am and after the inspection had taken place. He was asked whether he wanted to point anything out in particular but said not.

20. The property is a mid terraced house built in the early/mid 20th century of brick under a pitched roof which is of interlocking concrete tiles. It is in good condition so far as the Tribunal could see from the front. At the back, it was possible to see only the upper part of the property over the side fence of an adjoining property.

21. Particular note was made of the fact that the exterior appeared to be in good decorative order save, perhaps, for the front door. The bargeboards and front facing decorative gable end were in good repair. The windows were uPVC at the front. At the rear, the first floor door and window were probably wood as far as could be seen from a distance. It appeared that the roof had been refurbished in the not too distant past. The lead flashing and drainage channels seemed, when looked at from ground level at the front, to be clear and in good condition.

22. The property is in an excellent position, being close to Southend town centre and within easy walking distance of 2 commuter train stations with regular trains to London. It's disadvantage is that there is no off street parking and very limited on street parking.

23. Despite knocking twice at the door to the ground floor flat, the Tribunal members were unable to gain access to see any common parts.

The Hearing

24. The hearing was attended by those who attended the inspection. The Tribunal chair went through the legal position with Ms. Slassor. Unfortunately, it appeared that she had not read or did not quite understand the management fee position. She considered that the Respondent landlord was able to recover the cost of preparing end of year accounts as a separate fee. She also did not seem to understand that the charges raised by Countrywide were mostly not payable.

25. It is true that she had credited back to the Applicant's account much of the management fees previously claimed by Gateway. However, this was not sufficient.

26. She was asked about the sinking fund under a heading 'Reserve Fund' in the service charge accounts, for example at page 127 of her bundle. She said that this wasn't actually a reserve as the money had not been paid but it was to cover future costs for repairs and maintenance. She was asked whether there was a written plan setting out a programme for maintenance over the next few years with estimates of what would be required e.g. for external decorations, but she said that there was none.

27. Mr. Myers said that since he had bought the property, he believed that he had decorated the exterior 4 times, had replaced the windows and had mended a fence at the back. He preferred to do these jobs himself to make sure that his investment was protected. He paid the ground rent and the insurance to the landlord.

Discussion

28. As far as administration charges are concerned, there is no evidence that the Applicant is even contemplating forfeiture at the present time. In the correspondence produced, there is mention of forfeiture, for example in a letter from Pier Management to the Applicant dated 8th July 2014 at page 45 in the Applicant's bundle. However, even that letter states that the amount outstanding is below the £500 prescribed amount for forfeiture

which means that it could not be said that either the letter or the contemplated proceedings could have been in contemplation of forfeiture.

29. As far as service charges for the years 1/7/06 – 30/6/09 are concerned, the Tribunal has no evidence as to what they relate to. As it is for Mr. Myers to provide *prima facie* evidence of unreasonableness or non payability, he has not crossed the threshold of the test in the **Schilling** case referred to above. In any event, those charges appear to have been paid without protest at the time. Those charges are confirmed.

30. As to the period between 30/6/09 and 31/03/12, the Tribunal has seen the invoices from Countrywide and they are all for management fees save for two including a stock condition survey by Morgan Sloane. The invoice is dated 5th November 2010 and says "fee as per agreed structure based on 2 flats". The fee, including VAT, is £223.25 which is £111.63 for this flat. There is also a health and safety survey invoice dated 1st September 2010 for £211.50 which is £105.75 for this flat. The Tribunal was told that this amount has since been refunded to the Applicant as is confirmed in the account set out at page 27 of the Respondent's bundle.

31. There are one or two invoices for what appear to be accounting fees but these are not chargeable as service charges. Thus for one of those years, service charges of £111.63 appear to be reasonable and payable which means that the only management fees claimable for the years in question are 10% thereof plus VAT i.e. £11.16 + £2.23 = £13.39.

32. For the balance of the years in question, the amounts claimed are £400 per annum on account of service charges specified as management charges only. Some of this has been refunded. The problem is that the only management fees that can be claimed according to the lease are 10% of the service charge bill. If, as is the case here, there have been no actual non management service charge demands over the whole period, then nothing can be claimed for management fees – not even the accountancy fees.

33. Having a sinking fund is good management practice. However, a sinking fund should be calculated properly so that a tenant will know what is there and what it covers. He or she will also be able to satisfy any purchaser of the leasehold interest what is in reserve and perhaps make an appropriate adjustment on completion of the sale. Ms. Slassor said that a sinking fund is just to protect against future costs and emergencies, which is, with respect to her, far too simplistic.

Conclusions

34. Of the points in dispute mentioned above, the Tribunal, having taken all the evidence and submissions into account, determines that only the amounts set out in the decision above are reasonable and payable.

35. As far as costs and fees are concerned, it was clearly necessary for the Applicant to make the application to avoid future demands and threats. However, he has included amounts charged in the distant past of which he has not provided any evidence. On balance, the Tribunal does not think it just and equitable to make an order that the Respondent refund the application fee.

36. However, it is clear that the application did make the managing agents consider the terms of the lease. It is a pity that insufficient attention appears to have been paid to the lease which is written in very clear terms so far as management fees are concerned. Indeed, the Tribunal was very concerned to note that since 2009, the only management there appears to have been is a stock condition survey, possibly a health and safety inspection and twice annual external inspections by the current managing agents. And yet the current claim is for £3,172.37, most of which consists of management fees which are simply irrecoverable.

37. In the circumstances, the Tribunal considers that an order under section 20C of the 1985 Act is just and equitable.

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Bruce Edgington
Regional Judge
16th May 2017

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.