1273

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LSC/2016/0423**
Property	:	**65 Canadian Avenue, Catford, London SE6 3AX**
Applicant	:	**Canadian Avenue RTM Company Limited**
Representative	:	**Mr G Halton of Flat A**
Respondent	:	**Assethold Limited**
Representative	:	**Mr R Gurvits of Eagerstates Limited, Managing Agents**
Type of Application	:	**Liability to pay service charges and administration charges**
Tribunal Members	:	**Tribunal Judge Dutton** **Mr D Jagger MRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 26th April 2017**
Date of Decision	:	**9th May 2017**

DECISION

DECISION OF THE TRIBUNAL

1. The Tribunal makes the determinations as set out under the various headings in this decision.

2. The Tribunal does not make an order under Section 20C of the Landlord and Tenant Act 1985.

THE APPLICATION

3. The Applicant seeks the determination pursuant to Section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) and schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) as to the amount of service charges and administration charges payable by the Applicant in respect of the years 2009 to 2015 inclusive.

4. The relevant provisions relating to the law are set out in the appendix hereto.

5. Prior to the commencement of the hearing we received two bundles from the Applicant containing the application, directions, the Applicant's statement and the Respondent's statement of case. In addition, and separately, we were provided with a document headed Brief supplementary reply to the landlord's statement of case. The remainder of the bundles was taken up with copies of various documents to support the charges sought and correspondence passing between the parties. We also had a copy, albeit incomplete, of the lease of one of the flats.

HEARING

6. The Applicant was represented by Mr Halton, the lessee of Flat A. There are six flats in the property and the claim was brought by the Right to Manage Company, the Applicant, which had taken over that role in 2015. The Respondent was represented by Mr Gurvits of Eagerstates Limited who are the Managing Agents for Assethold Limited.

BACKGROUND

7. The property appears to be one half of a detached house converted into six flats at some time in the past. Judging from the date of the lease within the bundle, we would anticipate that it would have been in 1988 or thereabouts.

8. An inspection did not take place and nor was requested. The Applicant's had helpfully produced a document headed Statement of liability to pay service charge items which were broken down into a number of headings and we propose to deal with each of those separately making a finding on each matter as we proceed.

9. As background, it is appropriate to note that the Applicant apparently acquired the right to manage in March of 2015 after about three or four attempts. These various attempts have resulted in costs arising which we will deal with in due course. However, the difficulty in acquiring the right to manage, which Mr

Halton suggested was largely as a result of the Respondent taking technical points under the 2002 Act, had clouded the relationship between the landlord and his managing agents and the lessees who are members of the Right to Manage Company.

10. The first items we were asked to consider was a cost for **EXTERNAL DECORATING** in 2010 in the sum of £5,044,64. The statement of case produced by the Applicants quoted the internal repairing obligations which rests with the Applicant and not the external ones. There was a clear misunderstanding as to the provisions of the lease. The clause quoted 2(5) clearly requires the internal decoration of the flat in every seven years by the lessee.

11. The landlord's obligation to maintain is to be found in clause 4 of the lease which requires that the external walls, surfaces etc are painted when necessary. We were told by Mr Halton that the cost of just over £5,000 were excessive but there was no evidence to support this. Section 20 consultation had taken place which was not challenged and Mr Halton's submission was for us to determine whether the work was needed. He told us that he had been living at the Property since 2004 and that he thought there had been decoration works in 2005 and that UPVC windows had been installed in some prior to 2000. He sought to refer us to a photograph at page 182 of the bundle for condition but this was dated 2012 after these works had been carried out.

12. For the Respondent Mr Gurvits raised the possibility that the limitation period applied. He referred us to a letter to Mr Balmer, the tenant of what is referred to as Flat 5, written on 27th April 2010 pointing out that the earlier letter of 23rd April 2010 putting forward another decorator was out of time. The notice of intention to carry out the works was dated 21st January 2010 and expired in February 2010 some two months before any alternative contractor was suggested. He told us that the programme was to redecorate the exterior every five years. He accepted that the initial notice was somewhat generic in nature but the idea would be that if an alternative contractor was put forward, then there would be more definition as to the works required and quotes could then be obtained. He told us that the management charge was usually 15% of the contract price plus VAT. In this instance, the decorators had charged £4,288.75 and Eagerstates had added £755.89 for management and also for dealing with the Section 20 process.

TRIBUNAL'S DECISION

13. The Tribunal determines that the money is payable. There is no evidence to show that the costs of decorating the exterior were excessive at £4,288.75 and the management fee of 15% to include the section 20 procedures does not seem to us to be excessive. We cannot possibly say whether the works were required in 2010 but if they had not been decorated for some five years or so, then there is no reason to suggest that these works were unreasonable. The Applicants were offered the opportunity to obtain alternative quotations but the evidence we have seen indicated they left this too late. In the circumstances, therefore, we reject this element of the claim by the Applicant.

ACCOUNTANT'S FEES

14. These have risen from £316.25 in 2009 to £450 in December in 2014. It is noted, however, for example, that the accountant's fee for the period ending December 2013 was also £450. The dispute on the part of the Applicant is that no external auditing of the accounts had taken place. Although there were accounts prepared by Martin Heller, Chartered Accountants and registered Auditors for the periods in dispute, this was not at arms' length. It was said by the Applicant, that the accountant was an arm of Eagerstates Limited based upon the fact that the two companies had the same address. There is, however, no challenge to the fees that were claimed. It is right to note that the terms of the lease require that the accounts be certified and reference is made to an audit at clause 3(iii) of the lease, the wording being ... "and a certificate of the amount by which the annual cost exceeds the total of the annual contribution and any such expended surplus be served upon the tenant by the landlord or it's agent with audited accounts in support thereof" ... The accounts bear the following wording prepared by the accountants *"We certify that the above statement of service charges expenditure for the period ended 5th December 2014 in respect of this property is in our opinion a fair summary of the landlord's relevant costs for that period and is sufficiently supported by accounts, receipts and other documents which have been produced to us."* This wording appears in earlier sets of accounts.

15. Mr Gurvits dealt firstly with the independence of the accountant. The address 5 North End Road is the office address of the accountants which, not uncommonly, is also used as a registered office address for a number of other companies. Eagerstates in fact trade from an alternative address, albeit nearby. Mr Gurvits told us the accountants attend quarterly, check the accounts and the invoices. It is not, as he put it, 'a pop in and sign it' exercise. They inspect every invoice and raise questions.

TRIBUNAL'S DECISION

16. We are satisfied that the accountants Martin Heller are independent. The fact that they may have an office address at 5 North End Road, which is the registered office of the Managing Agents and others, does not mean that they lack independency. We were told that the practise address for Martin Heller is 5 North End Road and in the absence of any evidence from the Applicant to show otherwise, we are satisfied that the accountants are independent and have carried out a proper investigation into the annual accounts. There is no challenge to the fee levels and accordingly we find for each year in question the amount claimed as the accountancy fees by the Respondent is fair and reasonable and is payable.

MANAGEMENT FEES

17. The Applicant's statement of case suggests that there is a conflict between the freeholder and the management company. Essentially what is said is that once the process for the right to management was undertaken, the Respondent and Eagerstates ceased to have effective management of the Property and instead concentrated their efforts on trying to stop the RTM company from acquiring

the right to manage. It is suggested that during this period an Eagerstates surveyor failed to notice loose masonry on the ceiling to the front porch which could have caused problems. The management fees for the period 2009 to 2015 varied from £143.80 per unit inclusive of VAT in 2009 to £264 per unit in 2014. We were told that there was no cleaning or gardening undertaken by the Respondent and this was dealt with by the residents. Mr Halton told us that they had looked into the possibility of instructing outside management when the RTM company had acquired the right, but were told that the costs would be similar to those quoted by Eagerstates and decided to manage the property themselves.

18. Mr Gurvits explained to us that up until 2010 the management fees had been calculated on a percentage of the total expenditure. This had been 10%. They were advised, however, that this was inappropriate and should change to a fixed fee which they did in 2011 giving rise to a charge of £200 plus VAT per unit. We were referred to a copy of the management agreement. We were also referred by Mr Gurvits to a case in the Tribunal of flats at 104 Tollington Way where the question of independence had been raised by the tenants and rejected by that Tribunal. We were also referred to copies of some of the costings during the period 2010 to 2015, when it is said by the Applicants that the landlord gave up management, which clearly showed that management tasks were being undertaken. This was, for example, the repair of chimney stacks and other issues.

TRIBUNAL'S DECISION

19. The Tribunal determines that the management charges for the periods 2009 to 2015 are reasonable and are payable. Unfortunately, as with a number of issues little or no evidence has been produced to us by the Applicant to support these costs and indeed as was stated by Mr Halton the management costs of Eagerstates are similar to those that he himself had investigated when the RTM company was considering employing outside management. There is no evidence from the various annual accounts that works had not been done, which in our finding showed that management was being undertaken.

RTM FEES

20. The Applicant's case is that the RTM company had already paid some money to Assethold's solicitors in respect of the RTM acquisition. The issues raised are not relevant for us in these proceedings. The costs of the RTM company are payable under section 88 of the 2002 Act if the application does not proceed or is dismissed by the Tribunal. That is what has happened. Accordingly, if the Applicants wish to challenge those costs they must do so under section 88(4) of the 2002 Act. In fact, it was agreed that this is the step that they would take. We were, therefore, able to confirm with Mr Halton that he would make an application under the 2002 Act for what appeared to be three items of costs to be determined. One it has to be said appears to relate to section 27A costs but Mr Gurvits told us that this was an error and that they were in fact all relating to the RTM applications. Accordingly, unless the Applicant makes the application under section 88(4) of the 2002 Act within 28 days, the costs claimed will stand being £1,254.45, £1,549.99 and £240.

21. We therefore need to make no determination on these matters at the moment pending any application by the Applicant.

SECTION 20 CANCELLATION FEES

22. It appears that once the RTM company was set to acquire the right to manage, the Respondent discontinued a section 20 notice, which it appears may have been relating to repointing works. The statement of case appears to be referring to fire risk survey and fire and health and safety works neither of which required consultation as they were below £250 per flat. In fact, considerably below that.

23. It appears, however, from the evidence given at the hearing that the cancelled fee for the section 20 works was based upon an invoice dated 2nd March 2015 for £250 plus VAT. Apparently, we were told by Mr Gurvits that the minimum charge for a section 20 works is £250 and that he believed a second notice had been issued but the Respondent had decided not to proceed, both because the RTM process was underway and because there had been poor payment by the Respondents. We will return to that point in due course.

TRIBUNAL'S DECISION

24. The evidence again in this matter is unhelpful as far as the Applicant is concerned. They seem to be indicating that these works relate to fire and health and safety issues which did not require any consultation. We prefer the evidence of Mr Gurvits, this apparently related to some works possibly repointing which did need a section 20 consultation but that the Respondent had chosen not to proceed with that because the RTM process was underway and it would seem likely to be successful. A charge for the abortive s20 process seems reasonable.

EMERGENCY LINE

25. This apparently was introduced by the Respondents in 2010 although not charged until 2012. It is in fact an emergency help line run by Cunningham Linsey a large firm of loss adjusters at a cost of £10 plus VAT per unit. Mr Halton told us he thought that he had received some papers notifying them that this service was to be offered but he did not think that the tenants required this. Apparently, an offer was made to the Applicants to opt out but was not taken up.

TRIBUNAL'S DECISION

26. The documentation provided sets out the key facts and terms of the emergency help line. It appears to be accepted that information was given to the tenants that this help line was to be set up and nobody objected. It does not seem to us that a cost of £10 plus VAT per unit is unreasonable and we, therefore, allow that cost for the period 2012 onwards.

INSURANCE

27. The Applicant's complaint about the insurance was that the costs were excessive and we were referred to the case of Avon Estates v Sinclair Garden Investments

although no copy of that decision was provided to us. What we were told was that the RTM company had apparently obtained a virtually identical policy at a fraction of the price, although no evidence of this was produced. No true comparable evidence in respect of the Respondent's cover was produced either, although Mr Halton told us at the hearing that the RTM company was currently paying £670. For the record, the insurance during the period is as follows:-

- 2009 - £2,265.64
- 2010 - £2,265.64
- 2011 - £2,079.20
- 2012 - £2,115.03
- 2013 - £2,220.78
- 2014 - £2,265.19

Mr Gurvits told us that they get a breakdown of the insurances that are effected on a block policy on a monthly basis and that the insurance is dealt with by brokers. They presently manage some 400 buildings. There is a reasonable claims history for the subject property. Mr Gurvits told us they had attempted to insure the block separately but could not do so because the total claims history of the developments within the portfolio made this difficult.

28. We were told that prior to 2011 part of the managing agent's fees included dealing with insurance which was a form of commission. However, this was discontinued in 2011 and instead management fees were dealt with on a fixed basis rather than a percentage. (see above) Mr Gurvits told us the insurance was reviewed regularly and the claims were handled by Eagerstates and not through the broker. The sum insured was index linked and he confirmed that no commission was payable to the landlord or to Eagerstates.

TRIBUNAL'S DECISION

29. It is we think accepted that it is not unreasonable for a landlord with a large portfolio to deal with insurance on a block policy. This avoids difficulties in ensuring that insurance for each property is renewed on time and does cover the vagaries that there may be between different policies and their claim's history. It does not seem to us to be unreasonable for the landlord to adopt this approach.

30. By contrast the Applicants had not real evidence although page 94 is a document which appears to be by Abacus showing a total premium of £538.15 was payable but we cannot discern for what. The sum insured for the building is £676,000 and refers to various endorsements on schedules which are not provided. Unfortunately, we cannot accept this as alternative quotation evidence and in the circumstances, find that the premiums sought by the Respondents are reasonable. They give a premium of £360 or thereabouts per flat.

31. Two matters remain on the statement of case, one is an interest charge which is not a matter for us and is not a service charge that we can deal with. The second is in respect of ground rent collection and appears to relate to the administration charge rendered by Eagerstates of £60 for collecting £100 ground rent. This applies only to the period after the right to manage was acquired. It does not

refer to earlier periods of ground rent. At that time, prior to the RTM the collection of the ground rent would have been within the management charges of Eagerstates. Now of course it is not and it is said that the fee of £60 is perfectly reasonable. This includes any VAT and we were referred to the earlier Tribunal case involving flats at 104 Tollington Way, where the Tribunal found that this charge was reasonable.

TRIBUNAL'S DECISION

32. If the collection of ground rent had engendered this charge whilst Eagerstates were the managing agents, then we may have taken a different view but these are costs incurred by the landlord in serving notices as required under the 2002 Act for the recovery of ground rent and it is not in those circumstances unreasonable for these charges to be made. It would be easy enough, however, for the Applicant to avoid them if they paid the ground rent in advance, thus obviating the need for any demand to be made. However, we find that for the years in question the costs associated with the demands is reasonable, although only just.

33. Although the application makes reference to an order being sought under section 20C of the Act, in fact this was not made to us at the hearing. Instead, the Applicant sought to make a claim for Rule 13 costs as a result of the lateness of the lodgement of papers by the Respondent. The costs under Rule 13 were, therefore, in effect sought for costs of non-compliance. The papers should have been submitted by 9th March but were not received by Mr Halton until 31st March. This still gave him time to file the reply.

34. Mr Gurvits said that there had been problems in obtaining some of the paperwork and apologised for the late reply.

35. We did indicate that we might issue directions for a Rule 13 costs claim. However, it seems to us we can make a finding in this, which will hopefully save costs. Relying on the Upper Tribunal case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander [2016]UKUT/LC* we have come to the conclusion that although the Respondents were late in producing their paperwork, it nonetheless gave the Applicant sufficient time to file their reply and to prepare for the hearing. We cannot see that any prejudice or mischief has been caused by this failure on the part of the Respondents to adhere to the directions order. We do not consider that the Respondent's behaviour is unreasonable within the meaning of Rule 13. It does not cross the threshold of the first stage of the process as set out in the Willow Court case. We find it would be an unnecessary waste of the parties' time and the Tribunal's resources to consider a Rule 13 cost application in the circumstances of this case.

Judge: Andrew Dutton

A A Dutton

Date: 9th May 2017

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.

The Relevant Law

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.

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).

RTM Legislation
88 Costs: general
(1)A RTM company is liable for reasonable costs incurred by a person who is—

(a)landlord under a lease of the whole or any part of any premises,

(b)party to such a lease otherwise than as landlord or tenant, or

(c)a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2)Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3)A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4)Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by a leasehold valuation tribunal.