12695

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/OOMA/LSC/2017/0089**
Property	:	**23 Maple Court, Wayland Close, Bracknell, Berkshire RG12 9PD**
Applicant	:	**Maple and Laurel Court (1993) Limited**
Representative	:	**Mr L Gibson, Solicitor Agent and Mr N Pederson from the Managing Agents**
Respondent	:	**Mr Graham Mays**
Representative	:	**In person**
Type of Application	:	**Application for the determination as to the reasonableness and pay ability of service charges under section 27A of Landlord and Tenant Act 1985**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs S Redmond BSc (Econ) MRICS** **Mr N Miller BSc**
Date and venue of Hearing	:	**Coppid Beech Hotel, Bracknell on 29th March 2018**
Date of Decision	:	**3rd May 2018**

DECISION

DECISIONS OF THE TRIBUNAL

1. The Tribunal makes the determination set out under the various headings in this decision resulting in a liability for Mr Mays of £4,048.
2. The Tribunal makes no order under section 20C of the Landlord and Tenant Act 1985 (the Act).
3. The Tribunal determines that the Respondent shall pay to the Applicant the sum of £200 within 28 days of this decision in respect of the reimbursement of the Tribunal fees paid by the Applicant.
4. Since the Tribunal has no jurisdiction over County Court costs, fees and interest the matter should now be referred back to the County Court at Manchester under case D1QZ85X4.

THE APPLICATION

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the amount of service charges payable by the Respondent in respect of the service charge years to August of 2014 and to the period ending October 2015.

2. Proceedings were originally issued in the County Court at Manchester but by an order of that Court dated 27th July 2017 District Judge Hovington transferred the matter to the First Tier Tribunal as follows, *"the issue as to what sum the Defendant is obliged to pay by way of service charges and administration fees in respect of the property known as 23 Maple Court, Wayland Close, Bracknell RG12 9PD is transferred to the First Tier (Property) Chamber Tribunal"*.

3. The relevant legal provisions are set out in the appendix to this decision.

BACKGROUND

4. The Property, Maple and Laurel Court are two purpose built blocks of three storeys containing flats in pleasant grounds with ample car parking spaces.

5. We were able to inspect Mr Mays' flat before the hearing. This had now been decorated and was in good order. We noted that it was double glazed, that there was no central heating but there were individual storage heaters.

6. The Respondent holds a long lease of the flat which requires the landlord to provide services and the tenant to contribute to the cost by way of a variable service charge. The specific provisions of the lease will be referred to as necessary.

HEARING

7. The Applicant was represented by Mr Gibson, a Solicitor Agent and Mr Pederson the Managing Agent. The Respondent appeared in person. Before the hearing we had been provided with a bundle of documents, unfortunately because Mr Mays produced his own bundle this did result in some duplication.

8. In the papers we had received from the Applicant we had the claim form in the County Court, the order by the Court, directions order, the Applicant's and Respondent's statement of case, a witness statement by Mr Pederson, the lease and some further documentation.

9. In the bundle produced by Mr Mays, there were a number of documents including the statement of case, a letter from Miss Koziol who did not attend the hearing, and various letters said to support poor maintenance and other matters. We were also referred to an extract from a Tribunal decision in case CAM/OOMA/LSC/2016/0018 involving Flat 5 of Maple Court which decision is dated 23rd August 2016 and is referred to as the Decision in these reasons. The full copy was provided by Mr Gibson at the hearing. We also received from Mr Mays copies of a report from Christopher Edwards Associates dated 9th June 2015 and an earlier report from DJ Porter Chartered Surveyor dated 1st February 2010, together with a quote given to the previous managing agent, John Mortimer Property Management, in respect of insulation works dated 3rd March 2011.

10. It was of great help to us that Mr Mays had produced a table of items that were in dispute and those that were not. This indicated that there were only four items that he sought to challenge out of a total liability for service charges of £4,937. These items related to the balancing account of £485, costs in respect of works undertaken in August of 2014 claimed at £2,000 and referred in the Decision and two administration charges of £96 and £301.

11. In addition to these matters, there is a counter claim by Mr Mays seeking the sum of £1,755 for loft insulation, a court fee he incurred in May of 2017 and damages for injury caused by the Applicant.

12. We propose to deal with each of these matters in turn under separate headings.

13. The first item we will deal with is the sum of £485 which is a balancing charge which Mr Mays did not accept. The witness statement of Neville Pederson is dated 16th November 2017 and was in the bundle. On the question of the £485 the witness statement says as follows:

"Of the £485 balance, there is now produced and shown to me marked NP2 a true copy of a statement I have received from the previous managing agents dated 4th November 2015. It can be clearly seen that as at 31st July 2014 there is an outstanding balance of £485. Indeed, a review of the statement of account confirms that to be the position."

The situation seems to be that the previous managing agents, John Mortimer Property Management (JMPM), had prepared an account from 22nd October 2010. That starts with an opening balance of £45 and shows regular charges being incurred, initially at £45 per quarter and then rising £150 and thence to £180 and £210 per quarter. Against this Mr Mays was paying £45 per month but did not increase that contribution when the service charge demands were increased. This meant that as at the end of July 2014 he was in arrears in the sum of £485.

14. Mr Mays' response appeared to be that he did not necessarily believe that this was a true copy of the account held by JMPM. He said there was no "traceability." He did, however, concede that he had not checked the figures but merely restated that he did not believe them to be correct.

15. Mr Pederson in response said that the documents in the bundle at pages 49 and 50 were provided to him by JMPM when he took over the management in 2015. He had no input into them. These were JMPM's record. It is noted that Mr Pederson refers to them as being true copies and there is a statement of truth attached to his witness statement. Mr Mays said he had no idea where the copies had come from. We find that something of a fallacious argument. The documents have been produced to us and there is no reason to believe they are not bona fide. Mr Pederson referred to them as a true copy of the statement he had received and as we have indicated this witness statement contains a statement of truth. No sustainable argument has been produced by Mr Mays to suggest that the figure of £485 is not correct. One can see from the statements how this figure has amassed and he had done nothing to check whether those items shown and the sums demanded were correct. **In the circumstances, we find in the absence of any evidence to challenge same by Mr Mays that the sum of £485 is an amount that is due and owing.**

16. We then turn to the next item on Mr Mays' list which is headed Section 20 Levy August 2014. Mr Mays accepts that he owes the sum of £1,508 in respect of this item relying on the Decision made by the Tribunal in August of 2016. That Decision is common to both parties and we do not propose to go through it in any detail. Suffice to say, that the Tribunal then found that Miss Kosiol was not obliged to pay the full sum in respect of certain resurfacing works and that costs of a French drain were disallowed.

17. We were told by Mr Gibson that there had been a change of circumstances since this Decision. That change of circumstances is that the contractors who laid the French drain, GW Groundworks Limited, commenced County Court proceedings against the Applicants. The County Court at Reading found that the fees were due to GW Groundworks and the Applicants have had to pay them. It is said, therefore, that because there was this finding made by the County Court at Reading it removed the objection to these works as set out in the Decision. In discussions with Mr Gibson it became clear that the findings by the County Court were on a contractual basis. It appears that GW Groundworks were instructed to carry out the works by JMPM. The did so. The fact that those works may not have been necessary, as was found by the Tribunal in the Decision, merely removes the obligation on the lessees to make a contribution. Paragraph 27 of the Decision sets out the reasoning for the Tribunal's findings in that case.

18. Our finding is that nothing has changed. The evidence before the Tribunal at that time that the French drains were not needed has not be rebutted. The fact is that the Applicants have had to pay for the works is as a result of the instructions given to the contractors, which may well have been faulty. However, it seems to us somewhat perverse that if there has been no changes in circumstances we disregard the Decision made by our colleagues on 23rd August 2016. **We, therefore, find in this case that Mr Mays being prepared to pay the**

sum of £1,508 should do so and that he is entitled to in effect piggyback his position on the basis of the Decision.

19. The next two items are administration charges in the sum of £96 and £301. There was no documentation produced showing the terms of business or contract that may have been with the previous managing agents. There is no evidence before us to show whether these charges are reasonable. Mr Pederson told us quite candidly that he did not generally seek to raise administration charges. These appeared not to include the costs of the County Court proceedings which was the Court fee of £185 and solicitor's costs of £80. These will be transferred back to the County Court at the conclusion of this case. The Applicants withdrew the administration charge of £301 and we dismiss the administration charge of £96 as there is no evidence before us to substantiate this sum.

20. That therefore concludes the dispute between the Applicant and Respondent which was referred to us from the County Court. We calculate that the sum now payable by Mr Mays in respect of this matter, taking into account his payments in respect of service charges to October of 2015, to represents a liability of £4,048.

21. We turn then to the question of the counter claim. Mr Mays sought to explain some of the figures which he claimed. The first was the loft insulation of £1,000. He told us that he had adjudicated this sum himself. He had produced an estimate from Premier Decorating in July 2015 which says an estimate for decorating work to be carried out including insulation behind four sloping ceilings and making good and insulating the loft with 200mm top up insulation at a cost of £1,750. He thought the quote was excessive and decided that he would undertake the works himself. He did not produce any invoices and had not it seemed investigated the possibility of some grant. He told us that the original insulation was 75mm in thickness and he had put another 200mm on top of that. He had had to take out the plaster boarding in the ceilings by the dormer windows and had replaced that with silver-backed plaster board. He told us this had taken him a couple of days to install the insulation in the roof and he thought that the Applicants were liable to pay this. Reference was made to ducts from fans in the Respondent's flat which are contained in the roof and we were referred to the reports of Mr Edwards and Mr Porter.

22. It is perhaps appropriate at this stage to recount some of the contents of those reports. The first one is by Mr Porter and is dated 1st February 2010. In a paragraph in that report it says as follows *"As there are no obvious defects in the structure I am of the opinion that the condensation and mildew are the result of a build-up of humidity within the flat."* The report indicated that at the time of the inspection the flat was 'extremely humid' and the windows which were then single glazed were 'streaming with condensation'. There was mildew on some of the walls and the sloping areas of the ceilings. It appeared that the bedroom and the kitchen extractor fans were not working and when Mr Porter entered the roof space he found the fans were connected to flexible ducts, which were in place of the original arrangement which was a connection to a single outlet in the roof space. He did accept that the insulation of the sloping part of the roof was not adequate which would lead to heat loss and in turn allow mildew to develop. He

did, however, think that once the fans had been repaired and ducts vented to the exterior this would help remove water vapour.

23. In the later report by Mr Edwards carried out in January of 2015, he noted that the flat had no central heating but individual electric heaters and that there was mould staining in the rooms. There was condensation related dampness but no external indication as to how this may have arisen. Under his assessment he says as follows "*With due regard to the above observation it is considered that the various areas of dampness and staining noted within the bedroom, living room and bathroom all predominantly relate to condensation-based dampness. Condensation issues within properties are generally caused by a combination of issues typically resulting from the production of high levels of moisture which then condenses on particularly cold surfaces and in areas of restricted air circulation and ventilation. With regard to this particular property, the high levels of moisture production may largely be due to the internal bathroom which does not have an adequately operating extract fan. This is likely to result in high levels of moisture throughout the flat and the moisture appears to be condensing on the inevitably colder surfaces particularly where there is no insulation to the sloping ceiling areas and on window surfaces etc. Corners of rooms are always more prone to condensation related dampness due to poor air circulation.*"

24. The report then went on to set out certain recommendations which included the replacement of the extractor fan in the bathroom, ensuring that the fan from the kitchen extracted properly, an increase in insulation levels and possibly improvements externally. It was also noted that inconsistent and intermittent heating levels may also be contributing to the condensation noted.

25. Mr Mays told us that he had decorated his flat with anti-fungal paint and had put in a better ventilation system which appeared to be positive ventilation, a fan which blows air down into the flat to circulate it, which he had installed in 2015.

26. He told us that he had raised the question of insulation with the Applicants but they had decided against carrying out the works considering it to be an improvement. He was of the view, however, that the insulation has with other steps he has undertaken, cured the problem. As part of the claim he had assessed his labour costs at somewhere between £150 and £200.

27. Mr Gibson in response firstly raised a technical issue. His point was that no counter claim had been made in the Court proceedings and the Court transfer makes no provision or mention of a counter claim. Accordingly, there was no live pleaded counter claim that we could consider. In addition, there was no evidence to support the quantum of the claims that Mr Mays was making. We discussed this with both parties who took a pragmatic approach and agreed that they would be content for us to consider the counter claim notwithstanding that it was not included in the Court proceedings transferred to us. Ordinarily we are not in a position to deal with matters beyond that which the Court transfers. However, we will accept Mr Mays' request for the counter claim to be considered, the more so as of course the Applicants are willing for this to be resolved so that there is we hope an avoidance of any further litigation.

28. We will, therefore, consider the counter claim on the basis that the Applicants are content for us to do so.

29. In respect of the Court fee of £255, this apparently was the fee payable to the Court to get the judgment set aside. No application was made by Mr Mays in the Court proceedings for a refund of this. As we understand it, it appears that the judgment was obtained as a result of Mr Mays' failing to press the right button with the online lodgement of his defence. Accordingly, the judgment was entered because the defence was not filed in time and that can only rest with Mr Mays.

30. The final element was a claim for £500. He says that these are damages payable by the Applicants as there was no justification for the claim being made and it would have been reasonable for the Applicants to have sat down with him and talked about the issue. It was unreasonable that debt collection agencies were instructed attend and cause both him and his partner distress.

31. In response, Mr Gibson queried whether this was not something that Mr Mays was not already claiming in the £1,000. It was pointed out that Mr Mays had paid no service charges over the two-year period and indeed had not paid the monies which he admitted were due in the sum of £1,808 as set out on his schedule. All demands have had the summaries of rights attached so he knew what steps he could take to deal with the matter but did not avail himself of any application to the Tribunal to challenge the service charges.

32. Mr Gibson also indicated that the Applicant would like to consider a claim under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 and sought a refund of the hearing fee of £200. Neither party had anything further to add.

DECISION ON COUNTER CLAIM

33. Insofar as the counter claim is concerned, we are grateful to Mr Gibson for agreeing we could entertain this matter as it seems to be of benefit to both parties to resolve all outstanding matters that have arisen and which flowed from the County Court proceedings.

34. With respect to Mr Mays we do not consider there is any merit to any elements of his counter claim. Insofar as the insulation is concerned, it is accepted we believe by the parties, that at the time of construction the insulation installed was satisfactory. Whilst it is accepted that repairs and replacements could include improvements, there is nothing in the lease that deals with improvement work. It is fair to say that the prospect of insulation works had been considered as long ago as 2011 as a quote was obtained from A&M Insulations at the time, although it included a grant, which would only have cost individual lessees £99. No evidence was produced to show that any other tenant at the top floor of the two blocks has suffered from the same difficulties from which Mr Mays' flat has been suffering. The expert's reports do not in our findings assist Mr Mays. It seems there was a lack of proper ventilation both from the kitchen and from the bathroom which will have certainly contributed towards the condition of the flat. Further, the intermittent heating arrangements will also have caused problems. We have no doubt that the thicker insulation in the loft will have assisted but we

do not believe that that is the sole or indeed the main cause of the problems from which this flat suffers. Furthermore, there is no obligation on the landlord to do more than has been done, which is to continue with the existing level of insulation. If it transpires that each lessee at the top floor of the buildings in both blocks suffers difficulties then it may be something that could be reviewed but there would need to be agreement with the residents that such a step should be undertaken. Accordingly, the claim for £1,000 is not one that we can support.

35. As far as the court fee of £255 is concerned, this is solely down to Mr Mays' failing to lodge his defence in time. How that can be the responsibility of the Applicants we do not know. Accordingly, we dismiss that element of the counter claim.

36. The final element is redress for injury in the sum of £500. There is no evidence given as to how this sum has been calculated nor indeed given our findings in respect of the remainder of the counter claim any reason why such an award should be made. Indeed, we remind ourselves that Mr Mays has accepted he owes £1,808 yet made no attempt whatsoever to tender this amount prior to the hearing. In those circumstances, therefore, we dismiss Mr Mays' counter claim.

37. We do find that no order under section 20C should be made although there is no indication that any claim for costs is going to pursued. The Applicants indicated a wish to proceed against Mr Mays under Rule 13 and he indicated a possibility of doing likewise. We concluded that given the success of the Applicant at the hearing it would be reasonable to order that Mr Mays refunded the Applicants the hearing fee of £200, which should be done within 28 days.

38. We indicated at the hearing that we would issue directions. However, having considered the matter and reached our decision we are of the view at the moment that it would be difficult for either party to be able to establish that one side or the other has acted so unreasonably within the provisions of Rule 13 that a claim for costs should pursued. If parties feel differently they have 28 days from the date of this decision is sent to you, to approach us and make an application whereupon directions can then be issued. However, before they do so we urge them to take careful note of the Upper Tribunal case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander [2016]UKUT(LC)*.

Judge: Andrew Dutton

A A Dutton

Date: 3rd May 2018

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.

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 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.