13017

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAE//LSC/2018/0212**
Property	:	**114 Brondesbury Villas, Queens Park, London, NW6**
Applicant	:	**Nick Davies and Gemma Elwin Harris, Flat A, Cosima Lamb and Colm Brooke, Flat B**
Representative	:	**Applicants in Person**
Respondent	:	**Susan Roche**
Representative	:	**Respondent in Person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Abebrese, Mr Andrew Lewicki FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 October 2018**

DECISION

---

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

6. Neither party requested an inspection and the tribunal did not consider that one was necessary. Photographs of the relevant areas of the property have been provided by the parties and were referred to during the course of the hearing.

The issues

7. At the start of the hearing the parties identified the relevant issues and these are phrased in a series of questions

- Whether the freeholder is entitled to recover the cost relating to the small front garden of the property which do not appear to be part of the **reserved property or demised property in the lease**

- Whether the leaseholders are liable for the charges for the relevant years in relation to the garden and the cleaning of the hallway**. Are these charges reasonable and or necessary ?**

- Whether the freeholder can charge a management fee percentage on charges for her own time/work?

- Whether the freeholder is obliged to answer questions relating to the service charge account including how the management fee was calculated and to provide access to the freehold accounts when requested?

8. The applicants in the application also make the following points. The front garden has been in good condition since they became leaseholders. The common parts for the cleaning fee is charged consist of 1 hallway of approximately 4ft by 3ft and there is no explicit right to access or use the front garden in the tenant's lease. The disputed service charge cost are :

- Plants £275

- Gardening (freeholders own time) £440.00

- Paving garden (freeholders labour) £40

- Jetspray Garden £40
- Cleaning £670
- Management fee for 2016

The 2016 charges according to the applicants represent a 501% increase on the 2014 bill submitted by the respondent. The increases according to the appellant were imposed on the applicants without any notice.

9. The applicants also state that the charges have been levied after an exceptionally costly period in 2015/2016 when each flat owner were required to spend approximately £7000 on major long term repairs to the roof and walls.

The hearing and the evidence

10. The parties to the application did not provide the tribunal with any additional documents. The applicants were invited to present their case by going through the issues outlined above. It was submitted they do not have right of access to the front garden and furthermore the front garden is not defined in the lease as part of the demise or reserved part of the property and they should not be liable to pay service charges. We were referred to tab 1 page 13 which states the basis of the application and tab 4 page 1 which details the position of the parties in respect of the specific issues outlined above.

11. The applicants contend that the lease does not explicitly state that they are responsible under the lease to pay for the front garden area and it is not a communal garden. This it is submitted is clear in the 6th schedule of the lease. The lessor is not covenanted to maintain the front garden area according to the 7th schedule.

12. The applicants contend that the reserved area is defined and that is what they are liable for in the lease this was the advice that they received from their solicitors. Schedule 7 paragraph 5 defines the reserved area but there is no mention of the front garden area. The tribunal noted that the leases original drafts were in 2009 and 2015 and they had been no attempts by either party to seek to have the terms of the lease amended.

13. The response of the respondent is that the front garden area is part of the property and that the lease imposes on her an obligation to maintain it. The respondent referred us to tab 2 page 84 which contains the land registry ordinance map which shows that the garden is part of the property. The front garden is communal and the applicants have the right of access and therefore the contributions should be joint. The

respondents have decided not to make use of the front garden and she has not prevented them from doing so.

14. The parties then went on to present their case in respect of the second question which is whether the applicants are liable and whether the service charges are reasonable and or necessary. The applicants referred us to tab 1 page 10/11 and tab 4 page 3 of the hearing bundle which states the list of the charges which are in dispute. The increase according to the appellant has risen to 501%. The applicants submitted that they disagree with the amount of hours which is being claimed by the respondent. The applicants provided alternative quotes which are contained in tab 6 pages 1 and 2 the quote is based on similar properties within the locality. The hours as calculated by the respondent works out roughly to be approximately one hour a week this is not necessary as the front garden area is small. The tribunal noted that the quotes provided by the applicants related to other properties only and not the property which they reside in. The tribunal suggested to the applicants that it would have been of assistance if the quotes also related to their property.

15. The applicant also submitted that they were under the understanding when they purchased the flat that the service charges would rise at a modest pace and would not escalate rapidly without notice. The applicants provide in the bundle extracts from the questionnaire which they both completed at the time of the purchase. The service charges are not reasonable and or necessary.

16. The respondent in response states that the service charges are reasonable and necessary in comparison to the alternative quotations which have been provided. The cleaning fees included in the service charges makes it clear that it includes cleaning of the communal area areas such as the hallway, external entrance/exit paths, gate, walls and the paved garden area.

17. The tribunal went on to consider whether the respondent can charge a management fee. The applicants submitted that the management fee charges is a vehicle for the respondent to increase her cost and it should not be allowable. If there were management agents/contractor then arguably it should be allowable but not in this instance where there is none. In short the applicants point is that the respondent is not managing anyone except herself.

18. The respondent accepted that she had not employed a management agent/ contractor but she argues that she should be entitled to claim the management fees because the lease provides for management fees.

19. The parties then went on to provide their submissions and evidence in respect of the obligation on the part of the respondent to provide answers to questions of the applicants regarding service charge

accounts, including the calculation of management fees and to provide access to the freeholder's bank accounts.

20. The applicant stated that the full freehold accounts in particular the bank statements relating to the service charges have not been provided to them for inspection. In January 2015 following on from the confusion around the freehold accounts which were being run in respect of the major roof works, the respondent offered to set up a new bank account to manage all of the freehold monies.

21. The applicants were also under the impression that the respondent was keeping all of the monies in trust and they therefore have the right to see the bank account on an annual basis to corroborate the service charge accounts. The applicants have consistently made request to see the bank statements.

22. The respondent stated that the monies have not been held on trust and there is no sinking fund. The applicants have always preferred to pay the monies up front there was an instance where £70 was being held on behalf of Mr Davies but this was subsequently returned to him.

23. The respondent maintained that she had provided freehold accounts annually with copies of all relevant invoices and receipts.

DECISION AND REASONS

Recovery of the service charge cost relating to the front garden area

24. The tribunal finds that the small front garden area is part of the property and that the applicants are liable to a make a joint contribution to the service charges. The reasons for the decision are as follows. The applicants case is that the lease does not explicitly state that they must pay for the front garden and neither can the front garden area be treated as a common area. They claim that the 6th schedule does not impose a covenant on them to pay for the front garden and furthermore that the respondent is not covenanted to maintain the front garden. Paragraph 7.2 of the lease states :

"In any case where the lessor shall carry out any works pursuant to any covenants in this lease contained or implied the lessor shall be entitled either itself to carry out the said works or to employ any independent contractor (including the front area but excluding the rear garden) in relation thereto and either himself to receive or to pay such contractor the proper cost of such works".

The respondent according to the above paragraph can either carry out the works by herself or she can employ a contractor to carry out the works in this instance she has decided to carry out the works herself.

25. The first schedule of the lease defines the property as "all that piece and parcel of land situate and known as 114 Brondesbury Villas, London". This is reflected in the land registry. **This broad definition does in our view include the front garden area as part of the property.**

26. The Second Schedule of the lease defines the reserved area which is what the applicants say they are responsible for and that the definition does not include the front area garden but it does cover all parts of the **property** which would in our view come within the definition of the First Schedule : "First ALL THAT the dustbin enclosure forming part of the Property and SECONDLY ALL THOSE the halls staircases landings and other parts of the building containing flats forming part of the flats and THIRDLY ALL THOSE the main structural parts of the building containing flats forming part of the **Property"**

27. The Third Schedule deals with the demised premises and it also does not mention the front area garden but the wording is as such that it is in our broad enough to encompass the front garden areas as being a part of the Property : "ALL THAT the ground floor forming part of the **property** and being one of the flats and known as 114 Brondesbury Villas aforesaid as shown edged red on the plan attached to the existing lease".

28. The applicants at tab 4 page 2 of the hearing bundle provides the advice that was given to them by their lawyer on the front garden area : " The front garden is not included as it is not expressly stated under the Second Schedule. A **tribunal may be the last resort if all the parties cannot agree".** The respondent's lawyer advised her that : The demise for the lessees includes the garden at the rear but makes no mention of the garden at the front. Your obligations are to keep the reserved property and all fixtures and fittings in a good tenantable state of repair, decoration and condition. The reserved property does not make any reference to the front garden but it includes reference to the **"Property" which arguably does therefore include the front garden"**

29. It is the view of the tribunal based on the evidence and the facts that the respondent is entitled to recover the service charges/cost in relation to the front garden as the use of the word "property" in the paragraphs cited above includes the front garden area based on the application and interpretation of the clauses of the lease cited above.

30. The tribunal also did not find any evidence that the respondent has excluded the applicants from the use of the front garden area and that she uses it as her own private space.

Freeholder's Service Charges for the garden and the cleaning of the hallway are they reasonable/necessary

31. The applicants case is that the service charges are out of line with previous years and they were also not given prior notice of the increase. The increase is up to 501%. The main concern of the applicants is the the number of hours that is being charged. The applicants provided to the tribunal evidence from two similar properties within the area which they argue shows that the work could be done at a much cheaper rate. The quote from 83 Brondesbury Road states that on average around £500 in total is charged for cleaning and gardening combined. The quote from 30 Brondesbury Road states that they spend a total of £320 per annum which is for four flats. The respondent argued that the properties used by the applicants were not good comparables and that she has provided the applicants with quotes and that her charges are minimal. **Unfortunately the applicants did not provide the tribunal with quotes in respect of the subject property and on balance we preferred the evidence of the respondent.**

32. The tribunal preferred the evidence of the respondent that the increase in charges were due because minimal charges had been claimed for in previous years and that the charges were now outdated. The new charges fall below what a contractor would charge for the same amount of work. The service charges are necessary and reasonable in the circumstances, and the applicants lack of evidence of comparable quotations from contractors for the same work did not provide the tribunal with reasonable alternative figures. The tribunal also finds that the respondent over the years could have been more proactive in dealing with request for information especially in respect of the calculation of the hours. The tribunal makes the following findings on the items being contested and listed at tab 1 page 10 of the hearing bundle. We find that the charge of £275 is reasonable in respect of the plants ; the gardening charge of £440 is also reasonable ; the charge of £40 for the paving is reasonable ; the charge of £40 for jet spray in the garden is reasonable ; the charges for the cleaning we calculate this to be chargeable at £12.88 per leaseholder per week.

Management Fees

The tribunal on this issue preferred the evidence and submissions of the applicants for the following reasons. The respondent has not employed a management agent/contractor to carry out the works but she is charging the applicant 15% management fees for the cleaning and gardening when there is no third party involved. **The respondent we find cannot claim a management fee for managing herself this is not in our view what was envisaged by the clause in the lease dealing with management fees.**

Request of the applicants to access to service charge accounts and bank statements etc

33. The applicants are entitled to the inspection of receipts, invoices etc in accordance with Section 22 of the Landlord and Tenant Act 1985. The respondent is not holding any monies on trust and there is no reserve fund in this instance being held by the respondent. No monies are being held in a bank account by the respondent and therefore no order is made allowing the applicants access to bank accounts being held on their behalf by the respondent.

Application under s.20C and refund of fees

34. At the end of the hearing, the Applicants made an application for a refund of the fees that h had paid in respect of the application/ hearing. Having heard the submissions from the parties and taking into account our findings above, the tribunal orders the Respondent to refund any fees paid by the Applicants within 28 days of the date of this decision. The respondent in our view could have provided information that had been requested by the applicants over a period a time which would have assisted the applicants in gaining a better understanding of their position and perhaps avoid the need to make an application to the tribunal.

35. At the hearing, the Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charges.

Name: **Date:**

Judge Abebrese 23 October 2018

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).