13070

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AM/LSC/2018/0305**
Property	:	**Flat 69, Cottrill Gardens, Marcon Place, London E8 1NY**
Applicant	:	**Junction 67 (Hackney) Management Company Limited**
Representative	:	**Alex Burrell instructed by JB Leitch**
Respondent	:	**Adeeboyeea Omolade Gbadero**
Representative	:	**Self**
Type of application	:	**For the determination of the reasonableness of and the liability to pay service and administration charges – on referral from county court**
Tribunal members	:	**Judge Hargreaves** **Trevor Sennett MA, FCIEH**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR** **12th November 2018**
Date of decision	:	**12th November 2018**

DECISION

The Tribunal directs as follows:-

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1. The sum of £474.50 which the Respondent claims is repayable to him as an overcharge on his service charge account (in accordance with his defence and counterclaim as pleaded in E7CW8V28) is part of the service charges for which he is liable pursuant to *s19 Landlord and Tenant Act 1985* (ie invoice dated 15th March 2017 for £1303.13 is reasonable and payable).

2. In relation to the balance of the disputed items (invoice 13th October no. 1214167) the Respondent is liable (pursuant to *s19* above) for the sums charged to him

   2.1 pursuant to William Plumbing & Heating invoice VA018 for £120

   2.2 pursuant to RDS invoice 00013 for £400.

3. The Tribunal is not satisfied that the sum of £60 is a reasonable amount to charge for an administration charge and it is disallowed.

4. Computation of contractual interest and county court fees and costs will have to be referred back to the county court.

REASONS

1. It will no doubt be clear to both parties that the time and costs involved in issuing county court proceedings, with a transfer of part of the issues to the Tribunal, with a long half day in court, have exceeded the sums properly in issue. That is regrettable, particularly as it is clear that the Applicant is charging further administration fees (invoice 2nd November) which we have no jurisdiction to deal with (invoice served last week, and subject matter not pleaded or otherwise in evidence), relating to the costs incurred in the Tribunal hearing.

2. All references are to the bundle. Where a page number is prefixed by "R" it means a referral to tab 6 which was paginated separately by the Respondent.

3. The main issue relates to a dispute over plumbing and associated works in the summer-autumn of 2015 when the managing agents were HMS. They were replaced by FirstPort at the end of 2016.

4. As pleaded in the county court claim form (p1) the Applicant claimed the relatively small sums of £949.24 arrears of service charge and administration charges of £924 (not actually evidenced) plus a court fee of £105 and solicitor's costs of £80 (£2126.96).

5. The Respondent denied liability and counterclaimed for an overpayment of £474.50 (p2-3). As usual, on investigation, the shape of the real dispute is slightly different, the Applicant pleading

a balance due then on the service charge account. The state of the county court pleadings is unhelpful in determining the issues, despite a fulsome Reply and Defence to Counterclaim (p11). The matter was transferred to the Tribunal by orders dated 9th and 10th August 2018 (p44-5), and the Tribunal gave directions on 15th August. The Applicant rightly complained that the Respondent was in breach and that (it argued) it was prejudiced thereby. Fortunately, that turned out not to be the case: the real prejudice to the Applicant lay in pursuing a case without having primary evidence in support of some of its submissions, due to the change of managing agent. Nothing was going to change that on the evidence before the Tribunal.

6. Indeed, Mr Burrell made full and compelling use of the evidence available to him and it is clear to us that even if the Tribunal had debarred the Respondent from defending (which would have been disproportionate) the Applicant would have been in the position of having to prove its case on the evidence it had, and very little would have been gained by any party in taking tough procedural steps. The Respondent's witness, John Brady, assisted the Tribunal as far as he could but he was essentially limited to supporting a case which had been made on the documents at his disposal from the HMS files. To the extent to which he could assist, he was helpful, particularly since he readily accepted the limits of his personal involvement.

7. On analysing the issues at some length, they were narrowed down to three:- (i) the sum of £474.50 which the Respondent says he overpaid (ii) whether he is liable to pay service charges in the sum of £1045 as claimed by the HMS invoice dated 13th October 2015 (p190) (iii) whether he is liable to pay an administration fee of £60, that being the only administration fee we could identify by reference to a statement of account dated 8th November 2018, prepared as an update for the Tribunal hearing. See also p109-110 for the state of account immediately prior to issue of court proceedings. It is common ground that the Tribunal has no jurisdiction in relation to ground rent or interest charges, and the interest charges will have to be re-calculated as a consequence of our findings in any event.

8. As to the first issue, that turned out to be relatively straightforward once it was analysed. After FirstPort was appointed, they revised the amount chargeable half yearly in advance (as entitled to do in accordance with the lease). The Respondent's case is that he usually paid £828.63 and he was not going to pay the sum of £1303.13 charged (see p122 for example) because it was excessive and more than he was accustomed to paying on account. When pressed, he could not explain why, apart from the fact that it was more than usual: there being nothing on the evidence before the Tribunal to begin to explain why this charge might be unreasonably incurred or unreasonable in amount, it is plainly reasonable and payable. Apart from the specific items in issue (ii) there are no other service charge issues disputed by the Respondent. We therefore, for the avoidance

of doubt, reject his defence/counterclaim in the county court proceedings.

9. The Respondent's flat (no.69) is on the third floor of a five storey block. He rents it out. A copy of the lease of Flat 66 (said to be identical) is at p21. It is part of the story of 2015 that it was let to "Amina". The Respondent says she was a bad tenant, had let the flat go into disrepair, that he had a possession order against her, and that she left the flat at the end of July/first week in August, whereupon he engaged his own contractors to carry out plumbing and electrical work, and decorating. He denies liability for the service charges on the grounds that (i) the Applicant cannot prove that the state of disrepair in his flat (which he admitted) was responsible for damage to the electricity meter for flat 64 and a meter cupboard on the first floor, and (ii) that certain works said to have been carried out by a firm called RDS were not carried out.

10. By way of brief background, this takes us to issue (ii). It is a rather stale issue now. On 13th October 2015 HMS invoiced the Respondent for the sum of £1045 for items charged to him by HMS invoice 1214167 in the sum of £1045. We deal with it item by item after setting out the facts because there is a dispute. We say at this stage that we resolve the dispute about whether RDS *did* the works in favour of the Applicant, on the balance of probabilities.

11. The electricity meter for flat 64, which is serviced by accessing a cupboard on the first floor by the lift, was damaged by water sometime in July 2015. Between 20-23rd July 2015 HMS tried to contact the Respondent. He responded. Nothing came of the email exchange (Rp6-7) because on 22nd July HMS told the Respondent that "the situation" was resolved. No details were provided. This was unfortunate because HMS had in fact then sent a plumber round to flat 69 on 25th July "because there was a leak that caused one of your neighbours' electricity meters to blow. ... It has been established that your property and no.66 are the *two* properties with leaks which *contributed* to this happening (our emphasis)." The email dated 28th July (p187) goes on to attach photographs of flat 69 and a plumber's report (which we will call the "William" report) dated 25th July 2015. We find on the balance of probabilities that these documents were attached and that the Respondent is incorrect in saying that the first time he saw the William report was when it was in the Applicant's evidence (see email attachments list at p187). The report indicates that access was provided by Amina. It provides a comprehensive list of plumbing issues which require attention. There is no question that on the basis of the report and the photographs that the Respondent was in breach of his repairing obligations (Third Schedule, paragraph 2, p29). Indeed, the Respondent does not deny that. So he knew that by the email of 28th July that he was required to remedy the defects (listed again in the email) and that the managing agents concluded that the defects were a *"contributory"* factor to the damage to the "electricity meter

service shaft." But there is no direct causal evidence of that – the most at this stage is that it could be a *"contributory"* fact.

12. Two months later on 21st September the occupier of flat 67 reported dripping to the meter cupboard on the second floor (p186).

13. HMS emailed the Respondent the same day to check whether he had carried out the works outlined in the email of 28th July (p185). In a second email in the afternoon HMS emailed the Respondent required access from Amina or the Respondent for the following day, it being "imperative" to investigate. The Respondent told HMS "verbally" that he had carried out the works (p182). He is vague about the details but we find that he did, otherwise the allegation would not have been made.

14. On 23rd September 2015 HMS wrote a strongly worded letter to the Respondent (p182). HMS went to carry out an (unannounced?) check on 22nd September, access being granted by Amina, who was still in occupation at least 6 weeks after the Respondent alleged she had left (though he later said he couldn't really remember). HMS then alleged ".. the flat was in a state of disrepair ... This constant supply of leaking water had penetrated the bathroom floor and was then flowing out below the screed into the service cupboard opposite the front door of flat 69. From there the water was damaging the communal plaster walls and then flowing down into the service voids, causing yet further damage and will potentially cause other lessees' electricity meters to fuse."

15. The letter went on to affirm that over one month's notice of the need to carry out repairs outlined in the email of 28th July was being given (see Second Schedule Part II paragraph (d), Third Schedule paragraph 13, of the lease, p28, p31) and that therefore HMS would send in a professional plumber if the works were not done by 23rd October 2015. Notably paragraph (d) of Part II Second Schedule enables the Landlord to enter a flat "any time in an emergency" to repair etc. However, some of the disputed (required) works were carried out before 23rd October.

16. On 13th October 2015 HMS sent a lengthy letter to the Respondent (p172). It reiterates the 28th July correspondence (plus attachments) and the follow up correspondence on 21st, 22nd and 23rd September. It is a carefully worded letter. But HMS did not wait until 23rd October and the letter explains that works were carried out on 28th September and 5th October. No direct explanation was provided as to why time was abridged and the Respondent was not given until 23rd October to do any works, but there must have been some communication or further inspection because on the second page HMS state "you have only recently started taking action, although the workmanship within the property is less than desirable and whether or not the works are being undertaken by a professional in their field is definitely in question." The letter explains that a

plumber attended on 28th September "due to health and safety including fire reasons and to prevent further leaking of water." The letter then repeats the requirement to carry out the works specified in the William report by 23rd October. In other words, the Applicant decided that something had to be done before 23rd October, and it could do that where there was an "emergency". That criterion was met in our judgment.

17. The facts are reconciled as to the "emergency" point by noting that the works outlined in the William report are more extensive than those done by RDS on 28th September and 5th October. There was no response to this letter in the bundle. In fact there was a communication gap, given the circumstances.

18. The Respondent emailed the Applicant at the end of the following year: see the HMS follow up dated 20th December 2016 at p169. The Respondent has always challenged that HMS contractors carried out the works on 28th September and 5th October, so we turn to that (see eg his emails at Rp45-6).

19. The Respondent produced two witness statements to support his contention that these works were not done. The statements do not directly prove that on their face, never mind on the whole. We do not give these statements any weight evidentially: Mr Burrell could not cross examine the deponents, which was a much needed exercise. In the first statement at p48 Mr Ajanaku says he is a boiler and electrical engineer who carried out work at the flat (four days' worth) for £450 (no VAT) in relation to "plumbing work in the bathroom, tap leaking in the bathroom and immersion heater." He said he was contacted in August 2015 by the Respondent. It is utterly hopeless to expect us to determine from this statement what work was done on which days and why it proves that RDS plumbers did not attend as they claim. The Respondent said he bought the required parts but had no evidence to support that whatsoever and could not identify the works with any precision. So even if Mr Ajanaku did carry out works, it does not prove that RDS did not.

20. The same goes for the evidence of Mr Shittu (p50) who states that he carried out redecoration works at flat 69 when empty over a five week period from the end of July (for the sum of £1200). The reason we cannot rely on this statement is because Mr Shittu says he worked in the empty flat and has a distinct memory of letting William plumbers in on 25th July. Given that his invoice is dated 10th October (like Mr Ajanaku's) that recall after over three years is remarkable, not to mention flatly contradicted by the references made above to Amina's presence. Again, even if he carried out his works, that does not disprove the fact that RDS contends they attended on the two dates in question.

21. In the light of the above, we accept Mr Burrell's submission that RDS did attend to carry out works. That account is credible and

documented. The evidence on which the Respondent relies to the contrary is not credible and is rejected. In particular we found the Respondent's case on the departure of his tenant Amina to be wholly unsatisfactory: she was there well into September 2015 and in the absence of alternative explanations, on the balance of probabilities gave access on 28th September and 5th October.

22. We turn then to deal with the individual claims making up the invoice for £1045 (13th October 2015, p190).

23. The sum of £345 is said to be the Respondent's share of works carried out by THS Electrical Services in relation to the flat 64 electricity meter problem. We are unpersuaded that the invoice itself (p191) evidences that the state of repair in flat 69 is responsible for the damage. The handwritten note on it blaming the Respondent is undated and unidentified and is given no evidential weight. The invoice does not blame flat 69 and there were clearly other factual issues about other flats (eg flat 66) coming into play. It would be wholly wrong on the basis of this evidence to conclude that this service charge was reasonably incurred by HMS on account of the Respondent's breach of repairing covenant. The evidence is simply inadequate to make the causal link with sufficient force to justify a finding on the balance of probabilities. Further, THS suggest checking the flats above flat 64 and this would arguably exclude flat 69.

24. As to the William invoice dated 25th July 2015 (p192) we consider that even if the Applicant cannot prove that flat 69 was the cause of the leak so as to justify liability for the THS charge, it was on firm ground commissioning the William report in reliance on a suspicion that flat 69 was suffering leakage problems (clearly correct). The Applicant was entitled to obtain the report and it satisfies the *s19* criteria, and is payable.

25. We also find the RDS invoice at p197 in relation to works carried out for £400 on 28th September, to be reasonable and payable. The works carried out were identified in the William report (items 2, 3, 4 and A). The Respondent had had two months to carry the repairs out and had failed in such a way that HMS called the plumbers in very soon after the visit of 22nd September. We consider they were entitled to do so and charge for these works to stop further leaking.

26. As to the further work carried out by RDS on 5th October (p198), we are not satisfied in the absence of further information that it was reasonable to charge £120 for these two items or even to incur them on behalf of the Respondent. RDS should either have been satisfied with their own workmanship on 28th September or not charged for checking it on 5th October, and without knowing how it is said that the Respondent is liable for the works to "shave down riser door frame" (or even which one), we do not consider that we can find the works reasonable or reasonably incurred. So we reject that item.

27. As to the "adhoc" management fees of £60 attributable to dealing with the problems attributable to flat 69's water problems, we cannot decide that this sum was reasonable or reasonably incurred without seeing a copy of the HMS management agreement or a better explanation. We agree that the management of this issue took time, but whether that entitles a charge "adhoc" is another matter.

28. As to issue (iii), we are far from satisfied that the other administration fee of £60 for FirstPort chasing letter is justified: the Respondent, however narrowly, has justified his defence of these proceedings and that is a matter we can take into account. Also, we have not seen a copy of the letter relied on to justify the £60 charge and if as Mr Brady said it was a standard "chaser" we are not convinced such a letter is worth £60 if indeed chargeable (again, the absence of a management agreement is unhelpful in this context).

29. We do not intend to issue directions about Rule 13 costs. Any applications must be made in writing however and within 28 days. It is regrettable but inevitable that certain outstanding items now have to be dealt with by the county court. That should exclude contractual interest which the parties ought now to be able to calculate.

Judge Hargreaves
Trevor Sennett MA, FCIEH
12th November 2018

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.

<u>Section 20</u>

(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.

<u>Schedule 11, paragraph 2</u>

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

<u>Schedule 11, paragraph 5</u>

(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).