12898

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LSC/2018/0112**
Property	:	**8B Belmont Park Lewisham London SE13 5BJ**
Applicant	:	**Ms Gabrielle McDonald**
Representatives	:	**In person**
Respondent	:	**London and Quadrant Housing Trust**
Representative	:	**Tom Smith; Service Charge Co-ordinator for the Respondent**
Type of Application	:	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	:	**Judge Professor Robert M. Abbey Mrs Sarah Redmond (MRICS)**
Date and venue of Hearing	:	**11 July 2018 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 July 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:-

(2) The service charge demanded is a fixed service charge which does not come within the ambit of section 18 of the Landlord and Tenant Act 1985. Consequently this Tribunal has no jurisdiction to consider the reasonableness and payability of the charge.

(3) If the Tribunal is wrong on that then the service charges demanded for 2017-2018 and estimated for 2018-2019 are reasonable and payable by the applicant. Fire protection works were charges at £96.75 for the first year and £102 estimated for the second year. Management charges for the first year were £68.17 and estimated at £63.12 for the second year.

(4) The Respondent is to refund the Applicant's application and hearing fees.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of service charges payable for services provided for **8B Belmont Park Lewisham London SE13 5BJ**, (the property) and the liability to pay such service charge.

2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

3. The applicant was in person and the respondent was represented by Mr Tom Smith a Service Charges Co-ordinator for the Respondent

4. The tribunal had before it two trial bundles of copy deeds, documents and emails prepared by the parties.

The background and the issues

5. The property which is the subject of this application comprises a flat being one of four in a converted house. All the flats are let under assured tenancies with social rents

6. Neither party requested an inspection and the tribunal did not consider that an inspection was necessary in the light of the detailed and extensive paperwork in the trial bundle; nor would it have been proportionate to the issues in dispute.

7. The applicant is the current lessee of the property. On the 20 January 2004 Beaver Housing Society entered into a tenancy agreement with a Miss Chantelle Joseph in respect of 8B being the first floor flat. The tenancy agreement stated that the tenancy began on 2 February 2004 and was a weekly tenancy. The agreement was expressly described as an assured tenancy within the meaning of the Housing Act 1988. The initial rent was £66.39 per week. There was in the tenancy agreement a section for service charges but no amount was entered or shown in the agreement at the time of completion. Beaver Housing became part of the respondent group in 2005

8. By a written assignment of tenancy dated 13 March 2007 the leasehold interest was assigned by Ms Joseph to the applicant. In the recitals in the assignment the tenancy was described as a monthly periodic tenancy and the current rent at that time was stated to be £80.12. The respondent consented to the assignment and accepted the respondent as their tenant and has accepted rent from her from 2007.

The service charge provisions in the tenancy agreement

9. The preliminary and main issue that came before the tribunal was on the question of the nature of the service charge, i.e. was it a fixed or variable charge. Under section 18 of the Landlord and Tenant Act 1985 if the charge was variable then the Tribunal had jurisdiction to consider the matter. If not then the Tribunal has no jurisdiction and must reject the application. To assist in coming to a decision on this point the Tribunal looked at the terms of the tenancy agreement to consider the original terms set out in 2004. These stated in clause 1 (3) (i) that:-

> *"The Society shall provide the services set out below/in the attached schedule *(delete if not appropriate) for which the Tenant shall pay a service charge".*

10. The Tribunal noted that no deletion had been made in this clause, that no services were set out below and that there was no attached schedule to the tenancy agreement.

11. Clause 1 (3) (ii) provided that:-

> *"The Society may, after consulting the tenants affected, increase, add to, remove, reduce or vary the services provided".*

12. Subsequent clauses allowed the respondent to charge for services on the basis of either reasonable costs incurred during the previous accounting period or of estimates for the current or next accounting period. The respondent could establish a sinking fund and the respondent was to provide an annual account of the costs incurred the service charges due and the amount in the sinking fund if any. Clause 1 (6) (ii) stated that:-

> *"The service charge may be reviewed not more than twice in any one year."*

13. In fact the respondent advised the Tribunal that since Beaver Housing was absorbed into its group in practice the respondent has charged for services as a fixed charge in all years since 2007.The respondent therefore has not issued final accounts at the end of any financial year nor demanded any final balancing charge or charges from the applicant. The Respondent also advised the tribunal that the applicant has never requested final accounts at the end of any financial year for the period since 2007.

14. Moreover the annual rent increases were made by the respondent issuing Form 4 – Form prescribed for the purposes of section 13 (2) of the Housing Act 1988. The respondent confirmed that in the years where a service charge was levied they have been itemised within Form 4. The respondent then highlighted to the Tribunal Part 12 of the Notes in the Form in which it is stated that values for service charges should only be included where the service charge is fixed and not variable. The respondent says that the applicant has not challenged the inclusion of the service charge as a fixed charge.

15. On the matter of consultation as required by the tenancy agreement provisions the respondent says that by issuing a notice of rent and service charge at least four weeks before the implementation date in April of each year the applicant is thereby given the opportunity to raise queries about the proposed annual service charge. The tenant can also make a formal appeal against the proposed rent to this Tribunal and this right is set out in Form 4 sent to the tenant.

16. The respondent also confirmed that at the time of the hearing that if the tenant made an overpayment of service charges in one year, (because the landlord did not expend all the monies collect) then there would be no refund or allowance given. Similarly if there was an underpayment (because the landlord expended more than that collected from the tenant) then the landlord bore the expense and did not seek to collect the balance from the tenant. This is the hallmark of a fixed service charge.

17. Accordingly, the respondent's position appears to be that even if the Tribunal considered the original tenancy agreement provisions to

constitute a variable charge, this had clearly been changed by the conduct of the parties subsequent to the completion of the agreement. As it was a weekly/monthly tenancy it was conceivable that the original terms could be varied on any renewal of the monthly term, as would appear to be the case in this tenancy. The tribunal considered this to be a good argument in the context of the facts of this dispute.

18. The Tribunal considered the case of *Home Group Limited v Lewis & Others* [2007] RX/176/2006 as this was a Lands Tribunal decision that provided some guidance on the matter of whether or not the service charge was fixed or variable. The Lands Tribunal held that the charges which were capable of being varied each year by the Landlord pursuant to s.13 of the Housing Act 1988 were not service charges because there was no provision that the altered rent was to be calculated in any particular manner, or linking any alteration in rent (including the charges) with an alteration in the costs of providing any relevant charges.

19. Thus a charge is not made a service charge within s.18 of the 1985 Act merely because there is a provision in the tenancy agreement allowing the rent to be changed from time to time. If there is nothing in the tenancy agreement to link any change with an alteration in the costs of providing the services then it is a fixed service charge regime.

20. In this dispute it seemed to the Tribunal that the service charge for the property is like that in *Home Group*. This being so it must inevitably lead the tribunal to the conclusion that these charges are fixed charges and consequently the tribunal has no jurisdiction to consider their reasonableness. Moreover, since the creation of the tenancy agreement it is clear to the Tribunal that the conduct of the parties has meant that the terms of the tenancy have been varied. The variation is that there be this fixed service charge without reference to any end of year final accounts or indeed any sinking fund.

    If the tribunal is wrong on this point in regard to jurisdiction then it has made the following determination regarding the reasonableness and payability of the service charges.

The reasonableness of the service charges

21. The tribunal had to consider the charges for 2017-2018 and the estimated charges for 2018-2019. In both years the service charges in question were in two parts, first fire protection and secondly management and administration charges. Fire protection works were charges at £96.75 for one year and £102 estimated for the second year. Management charges for the first year were £68.17 and estimated at £63.12 for the second year.

Summary of the applicant's argument

22. The applicant asserted that in regard to the fire equipment works that she had never seen any person attend the property on behalf of the respondent to carry out any fire protection works whatsoever. She was adamant that no access had been requested or afforded anyone for the respondent and that as a consequence the works cannot have been carried out. She also maintained that the management charges were unclear given the change in charges said to have taken place in 2016 and were in any event excessive given the nature and quality of the services provided by the respondent.

Summary of the respondent's argument

23. The respondent asserted that the fire protection equipment works had been carried out and produced a certificate to that effect from BBC Fire Protection Limited the contractors responsible for these works. This was backed up with a copy works order sheet setting out the works performed at the time of the visit to the property by the company in November 2017.

Decision

24. The tribunal is required to consider if the service charges were fixed or variable charges. In the light of the above the tribunal took the view that they were fixed charges and consequently had no jurisdiction to consider their reasonableness. If we are wrong on that the Tribunal considers the service charges both reasonable and payable by the Applicant. The charges for fire protection works seem to be reasonable in regard to the annual inspection that made up the bulk of these charges. The Tribunal was shown a written certificate from BBC Fire Protection Limited certifying that the system was operational. This was backed up by a copy works order sheet issued by BBC confirming the "routine service to smoke alarms" and that "All items checked are in good order". However, at the end of this sheet there was written in "No signature – Pink copy left on site!!". The Tribunal were satisfied that notwithstanding the issues regarding the completion of the works order form that an inspection had taken place on 24 November 2017 and that the certificate was properly issued to confirm the system to be functioning properly after a test visit had occurred. Finally the Tribunal considered the management fees to be reasonable at the levels stated above as they did not seem at all excessive given the level of these types of fees seen by the Tribunal in other similar cases.

25. The respondent is to refund to the applicant the application and hearing fees. Rule 13 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (2013 No. 1169 (L. 8) provides that

"The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor".

26. The Tribunal noted that mediation was attempted in this dispute. The applicant confirmed her attendance at the mediation date but that the respondent failed to attend or to explain why they had failed to attend. When asked at this hearing the representative for the respondent could offer no explanation for the non-attendance but did apologise to the Tribunal for this. The Tribunal also noted the limited size of the claim and that one element of the service charges, (grounds maintenance), had been refunded in full to the tenant prior to the hearing. Accordingly, it did seem to the Tribunal that the Applicant had been given no alternative but to go to the Tribunal as a consequence of the conduct of the respondent and that in all these circumstances a refund of fees would be appropriate.

Name: Judge Professor Robert M. Abbey Date: 18 July 2018

27. Appendix of relevant legislation and rules

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.

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 Tribunal 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 for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.