12591

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LSC/2017/0224**
Property	:	**Flats 1-8, Seton Court, 57 Fairlop Road, London E11 1BQ**
Applicant	:	**Frances Ann Laing and the 7 other leaseholders listed on the application form**
Representative	:	**Cavendish Legal Group**
Respondent	:	**Berkar Limited**
Representative	:	**R.A Management Ltd**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge S O'Sullivan** **Mr N Martindale FRICS**
Date and Venue	:	**4 and 5 December 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**30 January 2018**

DECISION

Decisions of the tribunal

(1) The tribunal makes the determinations as set out under the various headings in this Decision.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) Given its findings it also declines to make any order to distinguish the applicants' litigation costs under paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

The application

1. The applicants apply for:-

   a) a determination pursuant to s.27A of the Landlord and Tenant Act 1985 as to whether service charges for the years 2008 to 2017 are payable.

   b) an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985.

   c) an order to extinguish their liability to pay litigation costs under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The applicants were represented by Mr Colville of Counsel at the hearing and Mr Ross appeared to give evidence. The respondent was represented by Mr Mendelsohn of RA Management.

4. During the course of the hearing the tribunal was passed various documents by the respondent, some of which he said had formed part of his statement but had not been included in the hearing bundle by the applicant. No point was taken by the applicants on the production of these further documents and they were fully taken into account.

5. After the hearing Mr Mendelsohn also produced a schedule in relation to insurance claims in 2014 (see below).

The background

6. The applicants first became entitled to the Right to Manage in November 2015 and in 2017 acquired the freehold reversion following a collective enfranchisement claim. On completion the respondent claimed arrears of service charge which the applicants say were not particularised and thus not payable. The dispute between the parties is clearly acrimonious and has a long history.

7. The property which is the subject of this application is a block containing 8 flats.

8. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate or of any particular relevance to the issues in dispute given the historical nature of many of the disputes.

9. The applicants each hold a long lease of a flat within the property which required 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 and will be referred to below, where appropriate.

The issues

10. The applicants had served a schedule setting out the charges in dispute which confirmed the years 1 January 2009 to 21 December 2015 to be challenged. However these were not as directed set out on a year by year basis but provided rather a total disputed for each individual item across all service charge years. The schedule itself lacked any proper detail although the applicants' disputes were set out in more detail in the witness statement of Mr Ross.

11. The respondent had not served a schedule in reply as directed but instead relied on the witness statement of Mr Mendelsohn, a director of the management company. In turn he relied on a series of manuscript notes attaching invoices and documents relevant to each service charge category.

12. Neither party had complied with the directions and both had presented their cases in a confusing fashion. Submissions and evidence were unclear at times and railroaded by matters which were obviously acrimonious to the long running dispute between the parties but of little relevance to the issues before us. We did the best we could on the evidence before us.

13. The schedule listed the following categories of service charge are in dispute:

(i) The annual management fee

(ii) Cleaning "external" and "internal"

(iii) Roof repairs in 2009

(iv) Insurance repairs in 2010 and 2011

(v) Fire Safety and Asbestos Reports 2011

(vi) Major works in 2012

(vii) Fire Alarm Service & Repair – 2013

(viii) Professional fees - leak from Flat 8 damage to Flats 6,4 and 2 – 2013 £2,634

(ix) Repayment of overpayment 2014

(x) 2015 Section 20 Abortive fees

(xi) Fly tip removal and Council Liaison £1,390

(xii) Special fees- Setting up Thames Water test £465

14. The tribunal heard submissions on each item in turn. We heard oral evidence from Mr Ross and Mr Mendelsohn. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The annual management fee

15. The applicants challenged the entitlement to a management charge on the basis that the landlord and managing agents were effectively the same entity. If any fees were recoverable at all Counsel submitted that they should be at the reduced rate of 10% of the cost of services provided as provided for in the lease when no managing agent was appointed.

16. The tribunal was provided with copies of management agreements for the years 2012 and 2013. It was also provided with an agreement for 2008 which was not relevant as 2008 was not in issue. Mr Mendelsohn

confirmed that there had been a management agreement in place for each of the years but said that he had not included copies for all of the years as he had not noted the management charge as a ground of challenge in the schedule.

17. As far as the amount of the management fee was concerned Counsel submitted it was extortionate. He made much play of what the management fee represented as a percentage of the cost of services. In response Mr Mendelsohn submitted that it was a reasonable fee for each of the years given the range of services provided. It was also submitted that the management agreement was a sham as the landlord and management company had shared directors and on that basis it was said that any fee was not recoverable. Criticism was also made of the fact that the landlord had been unable to provide copy agreements for all of the years in issue.

The tribunal's decision

18. The tribunal allowed the management charge in full and determines that the amount payable in respect of management charges for the years 2009 to 2015 is £13,092.

Reasons for the tribunal's decision

19. We did not consider that the management agreement between the landlord and managing agents was a sham. Although the landlord and managing agents had the same directors and some shared shareholders, they were separate legal entities. There are no provisions which make it unlawful for landlords and managing agents to have shared directors or shareholdings and it is in fact reasonably common in the case of landlords with a large property portfolio. We also noted from the bundle that RA Management provided services to other landlords acting as managing agents.

20. We saw no reason to doubt and accepted Mr Mendelsohn's oral evidence that there had been a valid management agreement in place for each of the service charge years. The applicant's schedule had not raised this point as an issue and although management fees were mentioned in the witness statement of Mr Ross they were not clearly identified as an issue. The landlord had not therefore prepared to meet this point. In any event Mr Mendelsohn produced management agreements for 2 of the years in issue and we had no reason to doubt his evidence that an agreement was in place for each of the other years.

Cleaning "external" and "internal"

21. In their preliminary case the applicants' case was that in the absence of the invoices the work undertaken was said to be excessive/exaggerated and unreasonable given the work undertaken. The respondent subsequently gave disclosure of various documentation relating to the cleaning costs in accordance with the directions. The respondent clarified that although the terminology had changed variously from *"caretaker"* to *"external cleaning"* there had been no change in the actual work carried out and in fact the cleaning had been carried out by the same individual over the entire period in question. The respondent says that no complaints had ever been received in relation to the cleaning and points out that as none of the leaseholders are resident they are not at the property to witness the standard of cleaning carried out. It is also said that no consultation was necessary as there was no contract in place. The total annual cost for the internal and external cleaning ranges from £1065 in 2009 to £1390 in 2015.

22. An email of 10 July 2014 in the bundle confirmed the activities of Mr Toussaint the cleaner as including sweeping and mopping staircases, sweeping the yard, minor gardening works, arranging for the removal of debris, changing light bulbs and generally reporting on issues arising. It was said he attended the property once a week and spent 45 minutes inside and 30 to 45 minutes on the outside.

23. In his witness statement Mr Ross accepts that some cleaning took place but says this was very limited. He relies on an email sent by his wife following a visit on 23 October 2009 in which the block is described by her as being *"in a very sorry state"* and noting that *"the stairwell was grubby"*. He considers the payment of around £20 per hour to be excessive for the work. He also questions how the cleaner gained access to the internal common parts as it appeared he did not have a key at the very least in 2011 when Mr Mendelsohn requested keys for a fire risk assessment. It is also said that in May 2014 he was informed that the fire alarm was reported as having been faulty for 4 months and it is questioned how this could be the case if the cleaner had been accessing the common parts. The applicant also says that it was reported in May 2015 that no cleaning of the common parts had taken place *"for several months"*. The RTM company took over duties as from June 2015 and was said to pay an hourly charge of £8.50 and a monthly payment of £100 based on 2 people cleaning every 2 weeks for 1.5 hours although no evidence was produced to support this.

The tribunal's decision

24. The tribunal allows the cost of the cleaning in full for all of the years in dispute.

Reasons for the tribunal's decision

25. The sums invoiced in respect of the cleaning are very modest at around £1.50 per week per leaseholder. Although there were allegations of a poor standard of cleaning across the period in dispute we had very limited evidence in this regard as set out above limited to 2 letters. If the cleaning were not being carried out as alleged we would expect to see a chain of correspondence and complaints detailing the deficiencies. In addition we had no one before us able to give oral evidence on the standard or regularity of the cleaning and we noted that none of the leaseholders were resident. In the absence of any compelling evidence to the contrary we allowed the cost in full.

Roof repairs 2009

26. This appears to be an accountancy issue only. This dispute relates to roof repairs which were paid for by Mrs Ross and appear in the accounts in the sum of £728. It is said that the actual cost was £832. The applicants allege that Mrs Ross has only been reimbursed the sum of £728 and is owed £104.

27. The tribunal was referred to various documentation by Mr Mendelsohn. The sum in issue was £728, each leaseholder was charged £91 not £104 and in fact Mr Mendelsohn explained that the leaseholders were undercharged.

The tribunal's decision

28. We accepted Mr Mendelsohn's explanation and did not consider that any refund was due to Mrs Ross. It appeared rather that the landlord had undercharged and this was supported by reference to the accounts and supporting documentation to which we were referred.

Insurance repairs in 2010 and 2011

29. This dispute relates to the handling of 2 insurance claims relating to damage caused by the ingress of water into flats 7 and 8 due to roof damage and theft of lead flashing. The actual works undertaken amounted to £14,100 undertaken by BDM Ltd and this was in respect of roof repairs and interior damage to flat 7. A further payment of £8,375 was made in respect of flat 8.

30. Mr Broder a surveyor instructed by RAM/Berkar inspected the flats on 28 May 2010 as part of the insurance claim. His fees were £814 for the survey and £2,541 for supervising the roof works and repairs to flat 7, this is a rate of 18%. RAM claimed a further £1,160 said to be 5% of net expenditure. Mr Ross says that the total which should have been claimed was £27,190 but that the insurance payment was £24,487

leaving a shortfall of £2,603 which he says was invoiced at £325.38 per flat. He said it was unfair that the burden should fall on leaseholders. It is also said there was no consultation on the fees of RAM.

31. The applicants also say that the fees are excessive and amount to 38% of the cost of works.

32. As far as the fees are concerned Mr Mendelsohn confirmed that due to the complexity of the claim the managing agents made a charge of 2.5%. His evidence was that a large amount of time was taken in dealing with the insurers to achieve full recovery.

33. During the hearing the tribunal was referred to a variety of documentation which evidenced the amounts received, in particular a letter from AXA dated 3 September 2010 and an email dated 25 January 2011 from Cunningham Lindsey reference 3457675. He confirmed that the insurers did in fact pay the professional fees which were received in 2014. The only item which had not been paid was emergency works in the sum of £1020 although confirmation had now been received that this would be paid. As the documentation was not complete after the hearing Mr Mendelsohn sent in a schedule of the insurance claim receipts as follows;

Allianz claim	£8,467.20
Allianz claim	£3,576.00
AXA refund of fees	£1,704.00
AXA refund fees	£814.00
Alliance	£12,707.00
Total	**£27,268.20.**

The tribunal's decision

34. We allowed the costs in full.

Reasons for the tribunal's decision

35. As far as the managing agents' costs were concerned we noted that the management agreement made express reference to the fees to be charged in dealing with such matters as insurance claims in a range of 5-15%. We found the managing agents fees to be payable and within a reasonable range. As these are professional fees they are not qualifying works and as such did not require consultation under section 20.

36. As far as the other costs were concerned from the documentation produced to us by Mr Mendelsohn there appeared to have been full recovery of all repair costs and professional fees from the insurers albeit in staged payments. We appreciate that this information may have been presented in a confusing and disorganised fashion. However we are satisfied from our perusal of the various documents and from the schedule provided from Mr Mendelsohn that full recovery was made of the costs from insurers.

Fire and Asbestos reports 2011

37. Mr Ross says that he has found a lengthy report but has not been provided with the copy of any invoice. After production of the invoices Mr Ross confirmed this was now agreed.

Major works 2012

38. A notice of intention was served was served in December 2009 with a notice of estimates being served on 25 January 2011. This specified that the lowest tender was £47,805 with the professional fees of OCK charged at 11.5% of the works. The section 20 notice included the repairs to the roof. The major works were delayed by the thefts of lead and roof repairs and were eventually completed in early 2012.

39. The final cost of works was £47,805 plus vat of £9,561. OCK fees of £750 were claimed for the consultation and a supervision and contract fee at 11.5% in the sum of £5,497.58 plus Vat of £1,249.52. RAM fees were also claimed in the sum of £2,855.83 at 5% of the net works figure plus the OCK fees. The fees are said to be excessive at a combined rate of 16.5%. It is suggested the RAM fees should be 2.5% at £1,264 and OCK's at 10% rather than 11.5% and these are the amounts in dispute.

40. Mr Mendelsohn explained that RAM fees were at 5% as the project involved a lot of work such as instructing the surveyor, collecting the funds, liaising in relation to the consultation and financing, sending out budgets and tenders, arranging access, none of which was covered by the annual management fee.

The tribunal's decision

41. We allowed the charges in full.

Reasons for the tribunal's decision

42. Mr Mendelsohn was able to take us through the documentation to show how the fees had been generated. The professional fees had been reduced from 12.5% to 11.5% and fell within a reasonable range for this type of project. RAM's fees were considered reasonable at 5% given the works involved. We considered that they fell within a reasonable range.

Fire Alarm Service & Repair – 2013

43. This item was disputed in the schedule but objection withdrawn after the invoice was seen and agreed at £725. .

Professional fees - leak from Flat 8 damage to Flats 6,4 and 2 – 2013 £2,634

44. After production of the documentation this objection was withdrawn.

Repayment of overpayment 2014

45. This was a purely mathematical point with the applicants saying that an underpayment had been made and a further credit of £288 was due per flat. This was agreed by the respondent.

2015 Section 20 Abortive fees

46. Fees are shown for section 20 abortive fees in the 2015 accounts in the sum of £5,724.33. Given the section 20 works did not proceed the applicants question how this level of fees can be justified. The applicants suggest fees for consultation only in the sum of £750 plus vat for two abortive consultations to be reasonable. As no contract was awarded it is questioned how there can have been a contract administration fee. RAM's fees were charged at 2.5% but the applicants say that no more than £37.50 is payable.

47. Mr Mendelsohn pointed out that the works did not proceed due to the RTM process. He took the tribunal through the various documentation and the supporting invoices. He explained that these were capital works and highlighted when the fee payments became due according to the documentation despite the works not proceeding. 50% of OCK's fees were payable as the project went as far as receipt of tenders and we were referred to the contract which outlined the stage payments. It was clear that there had only in fact been one consultation and Mr Ross had

been confused by the separate stages. However Mr Ross confirmed they were happy to stand by their offer of £1500 plus Vat for fees.

The tribunal's decision

48. We allowed the fees in full.

Reasons for the tribunal's decision

49. We were satisfied from the documentary evidence that the professional fees were properly incurred and considered them to be reasonable in amount. The largest fee in issue is the OCK fee which was payable at 50% as tenders had been received. This was in line with the contract terms. We were satisfied that RAM's fees were reasonable given the work carried out on the project which would not form part of general management fees.

Fly tip removal and Council Liaison £1,390

50. This item was made up of;

i. Cleaning Internal/External £675

ii. Cleaning materials £165- not challenged

iii. Bulbs £60 – not challenged

iv. Fly-tip clearance £490 challenged

51. The applicants challenge only the cleaning costs at £675 and the fly tip clearance costs at £490.

52. The cleaning was challenged on the same basis as previously. The applicants say that there have been few instances of fly tipping and those can be cleared without charge by Waltham Forest Council. It is also said that there are insufficient details to assess if the items dumped were actually left by a resident of the block.

53. The respondent says that there were numerous instances of fly tipping and that once items are dumped it must deal with them. A photograph is relied on and an invoice provided.

The tribunal's decision

54. We allowed the costs in full.

Reasons for the tribunal's decision

55. Our comments on the general cleaning are set out above and those costs are allowed on the same basis.

56. As far as the fly tipping clearance is concerned we had been provided with an invoice. We accepted Mr Mendelsohn's evidence that it was not known who had dumped the items. It is common that a local authority will not operate a free collection charge on behalf of a landlord although a free system for tenants operates. In circumstances where a landlord is not able to charge a leaseholder direct for the removal charges it is reasonable for it to recover the charge through the general service charge. We noted that the amount of the charge was not itself in dispute but in any event we considered it reasonable.

Special fees- Setting up Thames Water test £465

57. The applicants question whether this was an error as it is said access was in fact arranged in relation to the RTM process and the water test arranged as an after thought. On 30 March 2015 Mr Mendelsohn served a 10 day notice requiring access to all flats and an inspection was agreed on 12 April 2015. On 8 April 2015 Mr Mendelsohn advised that Thames Water wished to conduct a water test on the same day and this was then arranged by Mr Ross to take place in Flat 8.

The tribunal's decision

58. We did not allow the fee of £465 claimed by the landlord.

Reasons for the tribunal's decision

59. We saw no reason why the presence of the landlord was required in relation to the Thames Water test. In any event this is an activity which we consider should fall within the general management fee.

Application under s.20C and under paragraph 5A

60. The applicants applied for an order under section 20C of the 1985 Act and under paragraph 5A. Given that the tribunal has found mostly in the landlord's favour we decline to make any order under section 20C or under paragraph 5A.

Name: Judge O'Sullivan **Date:** 30 January 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 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.