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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Sections 27A 19 and 20C Landlord and Tenant Act 1985 (LTA 1985)

Application for a determination of liability to pay service charges and for an order that the Respondents costs shall not be recoverable as part of the service charge

Case Number:	CHI/00HG/LSC/2012/0057
Property:	82 Frobisher Approach Manadon Park Plymouth PL5 3UZ
Applicant :	Stephen Brown
Respondent :	Devon & Cornwall Housing Association Limited (DCHA)
Date of Application:	02 April 2012
Date of Hearing:	02 December 2012
Appearances:	Stephen Brown (the Applicant) Ros Ford Housing Officer DCHA for the Respondent Sue Davis Service Charge and Leasehold Manager DCHA for Respondent
In attendance:	Nikki Carmichael Service Charge Officer DCHA
Tribunal Members:	Miss Cindy A Rai LLB (Solicitor) Chairman Mr Michael. Woodrow MRICS Chartered Surveyor Mr William H Gater FRICS ACA IRRV Chartered Surveyor
Date of Decision:	8 January 2013

SUMMARY OF DECISION

1. The service charges demanded by the Respondent for the disputed years being part of 2011 and 2011-2012 are reasonable and were reasonably incurred.
2. The Tribunal makes an order under section 20C that the Respondent shall not recover any costs it has incurred in relation to the Application as service charges in the current or in future service charge years.
3. The reasons for its decision are set out below.

BACKGROUND

4. The Applicant made the Application under sections 27A, 19 and 20C of the LTA 1985.
5. Following receipt of the Application the Tribunal issued directions dated 3 September 2012 (the "Directions") setting a date for a pre trial review hearing which was held on the 3 September 2012.
6. Further directions were issued on 5 September 2012 directing that the Respondent supply certain additional information to the Applicant to enable him to prepare a statement of his case. The Respondent supplied most of the information it was required to provide and the Applicant produced a statement of his case but the Responded declined to produce any written response to that statement notwithstanding that it had been directed to do so.

THE INSPECTION

7. The Tribunal inspected the common parts of the building in which the Property is located prior to the Hearing on 2nd December 2012. It was accompanied by Ros Ford. The Applicant was aware of the inspection but was not present during it.
8. The Tribunal entered the Building within which the Property is located. It comprises two sections which are linked at ground floor level at the rear by seven integral garages. Each side of the building contains five flats spread over three floors. There is separate access to each side of the building. The Tribunal Members only inspected the part in which the Property is located. Access was gained through communal doors to a ground floor hall. Panel electric radiators are located in the hall, and on the first and second floor landings. These are quite small, and possibly inadequate to heat the area concerned. On the day of the inspection, none of these radiators were warm. The hall lights are not on a timer but the Tribunal was told that these contained low wattage bulbs.

9. The Tribunal was also told that those tenants and owners with flats in this block original plots 21 – 25 now 76, 78, 80, 82 & 84, had no access to the other linked block. It was also told that the garages had lighting which was metered back to individual flats but that there had been an adjustment recently when it was discovered that one or two garage lights had originally been connected to the communal supply.

THE APPLICANT'S CASE

10. The Application refers to the following service charge years:-
    a. August 2011 – March 2012
    b. April 2012 – March 2013
11. The Applicant had three particular issues:-
12. Firstly the allocation of costs relating to communal areas. He referred the Tribunal to the description of the common parts at clause 1.12 of his lease which is dated 31 August 2006 and made between DCHA and Katherine Louise Pearce, (the Lease).
13. The Applicant acquired the Property, which is a second floor flat late in August 2011, moving in on the 26th August 2011.
14. Clause 1.12 of the Lease states:-

    "the Common Parts" means the entrance halls, landings, stairways, corridors and lifts (if any) In the Building and the roadway forecourt pavement the bin stores amenity areas in or adjacent to the Building and all other parts of the Estate which are intended to be or are capable of being enjoyed or used by the Leaseholder in common with the occupiers of other units in the Estate and shall specifically demised to any leaseholder of a unit in the Building or the Estate.

15. The Building is edged blue on Plan 1 of the Lease; although that plan in the copy of the Lease provided to the Tribunal does not contain any colouring, the extent of the blue area was clear and includes ten flats being those plots numbered 21 – 30. (The Property was Plot 24). Plots 21 -25 are accessed on one side of the garages and Plots 26 – 30 are on the other side. Seven integral garages form the link between the blocks, (one of which is included within the Lease). There is no internal access between the blocks and the occupiers of one block cannot access the other and vice versa.
16. In the Applicant's view the Landlord should take account of this when apportioning electricity costs as it is impossible for occupiers in one block to control the use of electricity in the other.
17. In the service charge budgets for both 2010/1011 and 2011/2012 there is a note referring to an investigation of abnormally high electricity costs. The residents in both blocks must have been aware of this as was the

Landlord. He said that he had been informed that some residents kept the hall heaters on "day and night" and when others switched them off they were turned on again. Subsequently fuses were removed from the radiators but one resident called an electrician to repair them.

18. His argument is that it is unfair for residents of the two blocks to share the electricity costs when he believes that the majority of the electricity is being used by the residents of one block. If residents want more heating in the communal area they must pay for it themselves. At the moment one half is subsidising electricity used in another which is unfair.

19. He also questioned if the lighting to one of the garages was connected to the communal supply. He has raised his concerns with the Respondent but nothing has been done. He believes that the Respondent must take responsibility for resolving identified problems and, if appropriate, allocate the service charge expenditure differently.

20. He suggested that the Respondent agrees that the electricity costs should be recharged on a block by block basis and asked the Tribunal to order the Respondent to do this.

21. Secondly the Applicant also referred to the repair to the entrance door of the other block the cost of which has been shared between all 10 owners in the two blocks even though there is no benefit to him and the occupiers of his block. He considers it unfair that the Respondent can recharge him for a share of the cost of this repair. Furthermore an amount is included in the service charge for repairs and renewals but each year that has been credited to the sinking fund. When a repair is made a share of the charge is recovered from him which means he is paying on account of repairs and paying for repairs too. Effectively he is paying twice and in this case with out receiving any benefit from the repair.

22. His third complaint related to the increase in the "rent" following his acquisition of the Property. Prior to his purchase he was advised that the rent would be £209.71 per calendar month. He paid a deposit in advance of moving in and took possession of the Property on the 26 August 2011.

23. Subsequently he was advised he was in arrears with his rent and it transpired that his rent had been increased in October 2011 without his knowledge. An amount of £265 was being debited. He believed that under the Act he was entitled to receive a notice of increase in his rent and that such an increase could not just be imposed.

24. In response to questions raised by the Tribunals it was clarified that the monthly amount which he paid was both rent and service charge. He owns a share of the property and rents a share. The increase in service

charges in October 2011 was attributable to the increase in the service charge budget for 2011-2012.

25. The rent is payable contractually and the mechanism for increase is referred to in the Lease. The Tribunal has no jurisdiction to deal with increases in rent.

26. The term rent however was used by the Applicant to refer to his total monthly payment and the increase which he was querying relates to an increase in the service charge. The Tribunal was explained to him that the provisions of the Act upon which he sought to rely do relate to "pure" rent and not service charges.

27. In summary he said that:-
    a. his rent had been raised but he accepted that there was no breach of the Act in relation to the increase but he remained unhappy with having to contribute towards the costs of services which he does not receive or derive any benefit from;
    b. The deficit in the service charge accounts arose prior to his purchase
    c. The increase in the monthly sum he has to pay is causing hardship

28. He added that he has no complaint about any of the Respondent's employees all of whom have been helpful to him in responding to his queries.

29. He accepted that when he bought his Property there was a credit in the sinking fund referred to in the service charge accounts and from which he can potentially benefit.

30. He also asked that the Tribunal order the Respondent to reimburse his costs.

THE RESPONDENT'S CASE

31. The Respondent's case was presented by Ros Ford. She accepted that the budgeted costs for electricity in 2011 – 2012 are high. The note on the 2011-2012 expenditure budget confirms that this is being investigated. The Respondent had written to all the Residents in July 2010 but had not chosen to provide the Tribunal with a copy of that letter. She said that the whole of the budget deficit which is about £1500 is attributable to electricity costs.

32. The repair to the door entry system is a day to day repair and therefore has been charged to the service charge expenditure and not taken from the sinking fund which is only used to fund renewals not repairs.

33. When questioned about the provisions in the Lease, Ros Ford stated that the Respondent's policy is not based on what is actually contained in the

Lease. It is a policy applied in relation to all of the Respondent's properties regardless of what the different leases might provide.

34. The Respondent cannot control the use of electricity by owners and occupiers. Ros Ford confirmed that the communal supply provides power for the fire alarm panel lights and heating in the common areas. The lights are low wattage and the majority of the cost appears to relate to heating.

35. When asked why no written statement on behalf of the Respondent was provided Ros Ford said that the Respondent had chosen not to provide one.

36. In response to questioning Ros Ford accepted that there were two sections in the Lease relating to the reserve funds; one for the estate service charges and one for the building service charge. The accounts are shown separately in the Respondent's records but a single amount is shown in the service charge account and she referred to page 2. The building service provision is in paragraphs 4.2 and 8.2 and 4.2 and 7.2 and 8 of the Eighth Schedule to the Lease

37. She said again that sinking funds are only used for renewals but she will seek advice in relation to the interpretation of the Lease in relation to the Property.

THE LEASE

38. The definition of Building and Common Parts have already been referred to in paragraphs 14 and 15 above. The Leaseholder is obliged to pay the Service Charge in accordance with the Eighth Schedule and by equal monthly payments.

39. The provisions of the Eighth Schedule provide for the Landlord to compute an Estate Service Provision and a Building Service Provision and then calculate a Service Charge which is the total of both the Estate Service Charge and the Building Service Charge.

40. The Estate Service Charge Provision is a combination of the estimated Estate Service Charge expenditure plus an appropriate amount as a reserve or towards such of the matters specified in paragraph 5 s which might give rise to expenditure following the end of that service charge year and being likely to arise at intervals of more than one year, (the intention being to collect payments of similar amounts each year rather than fluctuating amounts).

41. Paragraph 5 refers to:-

    a. insurance costs

    b. costs of complying with legal regulations

c. legal and surveyors costs

d. rates and taxes etcetera

42. In the case of the Building Service Charge an amount for "costs of and incidental to the performance of the Landlord's Covenants contained in this lease and incidental expenses to any improvements carried out by the Landlord to the Building or to the Estate" can also be included. (Paragraphs 8.1 and 8.4 of the Eighth Schedule).

43. The Landlord is required to compute the budget before the beginning of each service charge year and will charge a Specified Proportion based on the estimates.

44. Following the end of each Account Year the Landlord must determine and certify the amount by which the estimate referred to in paragraphs 4.1 and 7.1 of the Eighth Schedule to the Lease shall have exceeded or fallen short of the actual expenditure and supply a copy of that certificate to the Leaseholder and make an allowance for any credit or collect any shortfall. (Paragraph 6 and 9).

THE LAW

45. Extracts from section 27A of the 1985 Act are set out below

S27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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.

46. Section 27A should be read in conjunction with section 19(1) of the 1985 Act which provides:-

S19 **Limitation of service charges: reasonableness.**

(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.

47. An extract from Section 20C is set out below.

Limitation of service charges: costs of proceedings.

(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 or leasehold valuation tribunal, or the Lands 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.

48. In determining this Application the Tribunal has jurisdiction to determine whether or not the service charges demanded by the Respondent are reasonable. The Applicant accepts his liability to pay his share of services from which he benefits but questions whether he is liable to pay for services from which he cannot benefit. The Tribunal cannot however order the Respondent to divide up service charges in a different way if it is complying with its obligations in the Lease and seeking recovery of costs which have been reasonably incurred.

DECISION AND REASONS

49. The Respondent is entitled to recover costs incurred in it fulfilling its obligations with regard to the repair maintenance and management of the Building which is defined within the Lease as including both blocks of five flats. Therefore it is not unreasonable for the Landlord to share the service charge expenditure equally between the ten occupiers.

50. However it would be helpful if as has been suggested, the Respondent might consider a review of its management of the Building and the division of the service charges. The Tribunal cannot however order it to do so on the basis that the current division of the costs however inequitable is in accordance with the Lease and is not unreasonable. The Applicant is aware of the Lease provisions and must have expected to pay a one tenth of any service costs incurred.

51. For those reasons the service charges relating to electricity and the repair to the entrance door are both reasonable and reasonably incurred.

52. The Tribunal has noted that the Respondent suggests that it was investigating the high electricity costs but similar notes appear on both the 2010 and 2011 accounts. It seems unacceptable that no conclusions had been reached with regard to the costs during the period between the issue of those two sets of accounts. The Respondent is recovering management and administration charges, which it is entitled to recover but is not demonstrating efficient management if such investigation still remains unresolved.

53. The Respondent is a Housing Association, regulated by the government and perhaps in receipt of state funding, and therefore arguably has a greater obligation to demonstrate that it properly complies with all its legal and contractual obligations. It is disappointing that it does not comply with its obligations in the Lease, as landlord, to provide an annual certificate

following the issue of the service charge accounts indicating if there is a shortfall or surplus on the basis of the estimated expenditure. Had it done so the deficit which the Respondent attributed wholly to electricity costs would have been highlighted to all occupiers sooner and perhaps more effectively?

54. The 2010 accounts show total contributions from occupiers of £3,005.80 In the same year the expenditure was £3,996.06 which was a shortfall of £990.20. There was already a deficit of £1,305.51 carried forward from the previous year so the total deficit at the end of that year was £2,295.77

55. Notwithstanding that the service charge income collected in 2011 was £3,528.00. That was in an increase of £522 which seems inadequate given the deficit in that year coupled with the deficit carried forward.

56. During the current service charge year 2011 – 2012 the Respondent has estimated expenditure of £2000 on electricity based on the previous year's expenditure. However the budgeted expenditure for 2010 – 2011 was only £500 notwithstanding expenditure of £756.69 in the previous year. It is unfortunate that the deficit was not addressed earlier which is what the Respondent is obliged to have done under the terms of the Eighth Schedule to the Lease and what it should have done.

57. The Applicant feels prejudiced by acquiring the Property with deficit in its service charge account. He told the Tribunal that his solicitor had difficulty in obtaining information about the accounts.

58. Following the hearing the Respondent sent the Tribunal copies of the information it had supplied to its own solicitors in response to an enquiry from the Applicant's solicitor. It appears that information was supplied to its own solicitor on the 18 August 2011, just prior to the Applicant's, purchase on the 26 August 2011.

59. The Service Charge Budget for 2011-2012 shows the proposed increase in the service charge but it seems unlikely that that information was actually supplied to the Applicant before his purchase. Some of the information is inaccurate as it refers to there being 12 flats in the Building when it seems apparent from the accounts that there are in fact 10.

60. A question about whether it was intended to increase the service charge was answered negatively, (Question 6.7). That reply appears incorrect as the increase referred to in the 2011 expenditure budget appears to have been imposed in September 2011.

61. Whilst none of the above can influence the Tribunal's decision it finds it disappointing even if there has been a change of management agent (which is what was suggested to the Applicant's solicitor as the reason for the delay in supplying information), that the Respondent has not managed

its administration of the service charges more efficiently and in accordance with its obligations in the Lease. Continuing disregard for the contractual provisions may make the Respondent vulnerable in the future with regard to recovery of service charges.

62. Given that the Respondent has agreed to consider reviewing how it splits service charge expenditure incurred for the benefit of the Building between the occupiers of two blocks it would be opportune for it also to address how it should deal with expenditure on repairs and renewals and whether in fact the sinking fund provisions within the Lease make it appropriate to take the costs of repairs, such as the repair to the entrance door, from the sinking fund. Paragraph 8 of the Eighth Schedule does include expenditure in connection with the repair management and improvement of the Building.

63. It is not acceptable for the Respondent to state that it does not take note of its leases but applies the same principles of management to all of its properties. It also seems inequitable to seek to recover a deficit, increased electricity costs and a provision towards an already healthy sinking fund and then separately seek to recover the costs of a repair from tenants who are clearly already paying more service charges because of a failure to investigate the electricity charge issue promptly and address the deficit in the service charge account more quickly.

64. The Tribunal has jurisdiction to award the repayment of the Applicant's costs by the Respondent. Schedule 12 of the Commonhold Law Reform Act enables it to award up to £500 if either of the parties has acted frivolously vexatiously disruptively or otherwise unreasonably in connection with the proceedings. The Tribunal does not find that the Respondent has acted in this way. It therefore makes no order for reimbursement of the Applicant's costs.

65. Under the terms of the Lease the Landlord is entitled to recover legal costs incurred in relation to the Application. Whilst the Tribunal is not aware that it has incurred any such cost or seeks to recover them it makes an order under section 20C that any costs relating to this Application shall not be recovered as service charges during the current or future service charge years. It makes this order because it considers that in dealing with both the Application and it management of the Property the Respondent has not demonstrated effective management of its obligations as landlord of the Property.

Cindy A. Rai LLB Solicitor