10236

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00ML/LIS/2013/0107**
Property	:	**FLAT 10, 20-22 LEWES CRESCENT, BRIGHTON, EAST SUSSEX BN2 1GB**
Applicant	:	**20-22 LEWES CRESCENT LTD**
Representative	:	**Mr. Gurion Taussig of Counsel Mr. Groves Mr. Newman both of Clifford Dann (managing agents) Mr. R Coleman, trainee solicitor Dean Wilson**
Respondent	:	**Ms. Judith Ann Russell**
Representative	:	**Ms. Russell assisted by Mr Barker**
Type of Application	:	**Section 27A of the Landlord and Tenant Act 1987**
Tribunal Members	:	**Judge D. R. Whitney Mr. A. O. Mackay FRICS Ms. J.K. Morris**
Date and venue of Hearing	:	**3rd April 2014 The Holiday Inn, Kings Road, Brighton**
Date of Decision	:	**7th May 2014**

DECISION

BACKGROUND

1. This matter was a transfer from the Canterbury County Court Ordered on 25th September 2013.

2. The Applicant is the freeholder and claims against the leaseholder of Flat 10, 20-22 Lewes Crescent, Brighton ("the Property"), Ms. Russell for unpaid service charges. The county court claim was dated 9th May 2013 and claimed a sum of £4431.04 together with county court costs and ongoing interest. The Respondent filed a defence dated 12th June 2013.

3. Following transfer directions were issued by the tribunal on 29th October 2013. Although the dates for the compliance were subsequently varied on various occasions the directions were substantially complied with by both parties. A bundle was supplied by the Applicants running to in excess of 660 pages.

INSPECTION

4. The Tribunal inspected 20-22 Lewes Crescent, Brighton ("the Building") immediately prior to the hearing. Unfortunately due to traffic congestion the Respondent was unable to attend but confirmed by telephone she was content for the tribunal to proceed with the inspection. The Applicant attended with the parties who attended the hearing.

5. The Building consists of two houses within a regency crescent which have been converted into 12 flats. The Building is Grade I listed.

6. From the front elevation the building appeared to be in a good state of repair and decoration. To the rear elevation was a more modern extension with below it seven parking spaces in the basement. Within the curtilage of the building was a separate freehold cottage known as Arundel Cottage.

7. Internally the communal areas were in good order and each floor was served by a lift.

8. The Tribunal was advised that Flat 10 was at the top of the building occupying the Fourth Floor and roof space. We were not able to access Flat 10 but were advised there were Velux style windows in a mansard roof to this flat although these could not be seen.

9. The basement flat has its own separate entrance and the Building benefits from under pavement vaults.

THE LAW

10. The relevant sections for this application are sections 19 and 27A of the Landlord and Tenant Act 1987 (set out in full in the Annex to this decision). The Tribunal had regard to these sections and also section 20 of the Landlord and Tenant Act 1985 in reaching its decision.

THE LEASE

11. The lease relied upon by the parties was dated 19th October 1972. This lease had been varied and extended subsequently but it was this document which set out the relevant service charge provisions.

12. The relevant clause was 2(25) and the Third and Fourth Schedules to the lease. Clause 2(25) provides:

> 2(25)(1) to contribute and pay to the Lessor as a maintenance and service charge (hereinafter called "the Service Charge") the aggregate of (a) eleven per centum of the annual costs expenses and outgoing incurred by the Lessor in complying with the obligations contained in the First Part of the Third Schedule hereto and of the other matters which without prejudice to the generality thereof are set out in the First Part of the Fourth Schedule hereto (b) Fourteen per centum of the annual costs expenses and outgoings incurred by the Lessor in complying with the obligations contained in the Second Part of the Third Schedule hereto and of the other matters which without prejudice to the generality thereof are set out in the Second Part of the Fourth Schedule hereto and (c) Fourteen per centum per annum of the annual costs expenses and outgoings contained in the Third Part of the Fourth Schedule hereto
> (2) The Service Charge shall be calculated and paid in accordance with the following provisions:
> (a) On each of the usual quarter days in every year the Lessee shall pay to the Lessor or its Agents in advance the sum of Sixty eight pounds seventy fice pence or such sum as the Lessor its Accountants or Managing Agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment on account of the Lessee's liability under sub-clause (1) of this clause
> (b) On or as soon as possible after the Twenty fourth day of June in each year the respective annual costs of the matters referred to in sub-clause (1) of this Clause shall be calculated and if the Lessee's share of such annual costs under the provisions hereinbefore contained shall fall short of or exceed the aggregate of the sums paid by the Lessee on account of the Lessee's contribution the lessee for the time being shall forthwith pay to or be refunded by the Lessor the amount of such shortfall or excess as the case may be notwithstanding any devolution of the Lease to the lessee for the time being subsequent to the commencement of the accounting period to which such shortfall or excess (as the case may be) relates

(c) The liability of the Lessee under the provisions hereinbefore contained shall be certified by a Chartered Accountant to be appointed by the Lessor.

THE HEARING

13. Prior to the start of the hearing the tribunal pointed out to the Applicants representative that the copy of the lease for the flat dated 19th October 1972 included within the bundle was incomplete. The Applicants representative helpfully provided further copies of the same.

14. The Applicant also sought to adduce various further documents at the start of the hearing. These included a spreadsheet of the invoices within the bundle prepared by Dean Wilson, solicitors for the Applicant, and a witness statement of James Groves dated 3rd April 2014.

15. The tribunal expressed its frustration at the late filing of these documents, particularly the statement of Mr Groves. No application had been made in advance of the hearing and the directions issued had been very clear as to what was expected. The tribunal was concerned this was a case issued in the county court nearly 12 months ago and the Applicant should have had their case in order. The reason given for the delay was that the previous managing agent was very unwell and difficulties had arisen obtaining information from him.

16. Whilst the tribunal was far from satisfied with the explanation the Respondent helpfully agreed to the admission of the spreadsheet and later in the day after time for the Respondent to consider the witness statement of Mr Groves they agreed to the admission of this as well.

17. The tribunal reminded the parties that given this was a transfer from the county court the tribunal was restricted upon matters it could adjudicate to those set out in the order transferring the matter to this tribunal. The matters being the reasonableness of the service charges and whether the same were payable. The tribunal noted that the Respondents appeared to have filed evidence relating to what properly would be described as a claim by the Respondents for breach of covenant by the Applicants in respect of repairs and this was not a matter which the tribunal could adjudicate on. The tribunal reminded each party that they must rely upon their own advice.

The Applicant's Case

18. Counsel for the Applicant explained the figures they were requesting the tribunal to adjudicate upon where those set out at page 26 of the bundle contained within the Applicant's statement of case and headed "Particulars of Service and Administration Charges Due". Counsel for

the Applicant conceded that matters relating to company administration were not a service charge and in particular Company Secretarial fees in the sum of £650 and Companies House fees in the sums of £13 and £14.

19. Counsel referred the tribunal to the lease dated 19th October 1972 which set out the relevant service charge provisions. Whilst there had been two deeds of variation and a surrender and re-grant it was this document which set out the service charge mechanism. In particular counsel relied upon clause 2(25) of this lease. Clause 2(25)(2)(a) provided that interim service charge payments could be demanded "on each of the usual quarter days" with such payments to be at the Applicants discretion as to a fair and reasonable interim payment.

20. Clause 2(25)(2)(b) provided that accounts shall be prepared after the 24th June in each year and clause 2(25)(c) provided that these were to be certified by a Chartered Accountant.

21. Further counsel for the Applicant relied upon the Third and Fourth Schedules as to what was to be included within the service charge.

22. The tribunal asked the Applicants to direct them as to what provision allowed for the recoverability of administration charges. At this point it became apparent that counsel for the Applicant required further instructions and the tribunal therefore adjourned early for lunch to allow counsel to obtain full instructions upon the issues.

23. After the adjournment counsel explained that no balancing charges had been sought or accounts issued. All that was being sought was recovery of interim charges and administration fees. Counsel suggested that the sums claimed were reasonable as interim charges having regards to the companies accounts prepared showing the Applicant's annual expenditure. The tribunal was referred to the accounts within the bundle.

24. With regards to the administration charge of £25 this was demanded by way of an application for payment dated 21 November 2013 and included at page 40 of the bundle. It was suggested that on the reverse of such a demand would have been the statement of rights and obligations relating to service charges but not that relating to administration charges. Counsel submitted that The Fourth Schedule, First Part clause 6(1) allowed recovery of this cost from the Respondent.

25. Counsel for the Applicant suggested that he did not believe the legal costs and interest were contested.

26. The Applicants went through the companies accounts to show what was included. These included what is known as the Garden Rate demanded under Kemp Town Enclosures Committee. It was suggested this is properly recoverable under the terms of the lease.

27. The tribunal were directed to the insurance invoices. An invoice in respect of Directors and Officers Insurance was conceded by the Applicants as not being a service charge expense.

28. Mr Groves explained that the accountant, Rollo Burgess, for the purposes of the companies accounts accrues expenditure over the whole year. It was explained by Mr Groves that in setting the interim charges reference is made to the companies accounts and a charge levied in line with those. The amount had remained the same for each year in question as in his opinion an interim charge of £3,000 per annum per flat seemed a reasonable amount to cover the Applicant's ongoing costs.

29. The Applicant's referred the tribunal to the various invoices for legal sums claimed.

30. In respect of managing agents charges it was explained that in respect of the former agent, David Pursey (Management) there was no contract as such but each year he would make a proposal in his report to the Applicant. Clifford Danns fees were within a contract and set initially at £2000+VAT per annum and this had risen in line with inflation. It was submitted that this was not a qualifying agreement.

The Respondent's Case

31. The Respondent was represented by her husband Mr Barker. He read out an email sent by the managing agents to a director which he suggested showed that there was a level of resentment shown towards the Respondent.

32. He submitted that the accounting was shambolic. He suggested that no accounts had been certified in accordance with the lease and disputed that Rollo Burgess was a Chartered Accountant as required under the lease. In his opinion the accounts did not comply with the technical guidance for service charge accounts and the sums collected should be separate from company monies. In any event in his opinion the costs of Mr Burgess did not relate simply to the service charge but included work for the company which was not a service charge expense.

33. In respect of the mechanism for collection of interim payments he contended that not all payments had been actually demanded on a usual quarter day and so were not payable. In particular the demand for £1971.97 was demanded on 19th July 2011.

34. In respect of the legal costs Mr Barker contended these were not a service charge and so not payable by the Respondent.

35. Mr Barker contended that no budgets had been prepared or issued to leaseholders. He suggested that there was no evidence of a process being undertaken to estimate expenditure.

36. Mr Barker went on to contend that notwithstanding the earlier tribunal decision between the same parties charges were unreasonable in respect of the insurance charged. Mr Barker was concerned that no valuation for insurance purposes had been obtained and in his opinion the building could be under insured. He was concerned therefore that the interim charges may in fact be too low. He referred to the fact the Applicant had said no valuation had been undertaken due to the lack of funds. He could not understand why funds had not been obtained. Mr Barker had not had a valuation undertaken as he suggested without access to all flats within the building this would be inadequate. He suggests under the RICS guidance a revaluation should be undertaken.

37. He accepted that the sum being charged for the insurance actually in place is a reasonable amount. The issue is whether the building valuation is correct and that the insurance is adequate. Further he was content with the engineering insurance (which relates to the lift) but does not agree the Directors and Officers insurance.

38. In respect of management fees he contended that he had not seen all the invoices of David Pursey (Management). He suggested that if there were no invoices no charge should be allowed. Further he was concerned about the supervision fees charged by David Pursey for major works in the sum of 14%. He suggested that the company should have looked elsewhere for cheaper quotes to supervise works to the Property and that as a result this sum was unreasonable.

39. In respect of Clifford Danns fee he contended these included works relating to acting as the company secretary and these were not a service charge expense.

40. Further in his opinion given the shambolic state of the accounts Clifford Danns fee should be reduced by 25%. Mr Barker referred to damage to the Respondent's flat and contended that Clifford Dann had been evasive and acted partially with regards to this against the interests of the Respondent.

41. In respect of the legal costs he suggested again that there were no invoices within the bundle for all of the amounts claimed. As a result if there are no supporting vouchers no amount for these should be allowed. Further certain of the invoices, including the claim for £609.82 appear to relate to court proceedings issued against the Respondent and should be dealt with within those proceedings. Further he contends the fees charged are not reasonable and much of the work could have been undertaken by the managing agent.

DECISION

42. This case was difficult for the tribunal to determine. There was a very substantial bundle filed prior to the hearing yet the Applicants case was far from clear despite counsels efforts. The managing agents who attended did not appear to be clear on the make up of the accounts and how these were prepared. A complete witness statement from the agents, filed in advance, in accordance with the directions, dealing with the issues would have greatly assisted the tribunal and we suspect the parties themselves. The tribunal had great sympathy with the Respondents and their suggestion that the accounts were a shambles.

43. The tribunal reminded the parties at the end of the hearing that they need to communicate properly with each other given they will have an ongoing relationship.

44. This being said the tribunal must look at the task it was asked to determine by the county court. Having regard to this the sums it has to determine are those set out in the Applicants statement of case before this tribunal being at page 26 of the bundle. Any issue about payments made and allocation of the same is for the county court. The tribunal highlights it makes no determination in respect of ground rents claimed or in respect of any claim the Respondent may or may not have in respect of any breach of covenant by the Applicant. Those are matters not within this tribunals jurisdiction.

45. The tribunal heard much about the accounts and the make up of the same. The tribunal notes that it is not suggested by the Applicants that any balancing actions have been undertaken including the formal presentation of service charge accounts to the leaseholders. The tribunal is at a loss to understand why such accounts have not been prepared, submitted to leaseholders and balancing charges/credits applied given the lease provides that such accounts should be prepared as soon as possible after 24th June in each year. The tribunal notes that the accounts presented to it within the bundle are in fact company accounts, different from service charge accounts. These accounts have not been certified in accordance with the lease. No evidence was adduced that Mr Rollo Burgess was a Chartered Accountant or had so certified the accounts presented.

46. In respect of the interim charges in simple terms Clifford Dann, the current managing agents, say that these have been calculated with regards to the company accounts. No budgets as such have been set nor any more complicated process undertaken. The figure of £3,000 per annum was in their view a reasonable figure and remains so. They increased it to this figure when they took over having reviewed the previous figures. The previous years were set by David Pursey and there was limited evidence as to how he determined the amounts save for reference to a report he would issue each year. Whilst the tribunal would have preferred to have seen budgets there plainly is a methodology. It is reasonable for interim charges to be set at a level having regard to previous years expenditure and so the tribunal accepts that these sums are reasonable.

47. The tribunal determines that the following interim charges are due and payable:

• 24th June 2011	£575
• 29th September 2011	£575
• 25th December 2011	£750
• 25th March 2012	£750
• 24th June 2012	£750
• 29th September 2012	£750
• 25th December 2012	£750
• 25th March 2013	£750
• 24th June 2013	£750
• 25th December 2013	£750
TOTAL	£7,150

48. In respect of the administration charge of £25 dated 3rd April 2012 we find that this is not payable. The demand for the same to which we were referred did not include a statement of rights and obligations as required. In any event whilst we accept that the Fourth Schedule allows recovery of this sum as a service charge this is not how it has been claimed. It has been claimed as an administration charge simply from the Respondent. The tribunal were not referred to any other provision which allowed recovery of the same.

49. In respect of the legal costs and interest of £609.82 the Tribunal has considered the bundle supplied. We note the application for payment at page 40 of the bundle dated 21 November 2013 refers to this being in respect of "Costs awarded by Court incl interest". In this tribunals view this is not a service charge. If there is already an order for this sum (and no order was included within the bundle) then this sum should not form part of the claim before the county court as it has already been awarded against the Respondent and is plainly not a service charge.

50. The tribunal then considers the demand said to be dated 19th July 2011 in the sum of £1971.97. This appears to be the demand issued by David Pursey (Management) found at page 37 of the bundle. It is described as a "supplementary contribution in advance to service charge account for one quarter from 24/06/2011". The demand refers to this as being in respect of redecorations to the south west elevations. This sum has not been demanded in accordance with the lease. An interim demand for the June 2011 quarter day had been issued without reference to this sum. It is for the Applicants to comply with the lease terms and this sum is not recoverable as an interim charge. Plainly subject to satisfying compliance with lease terms and statute then any costs associated with any major works undertaken may be recoverable once proper certified accounts are prepared in respect of any balancing

charge which the Applicant may be entitled to recover from the Respondent.

51. Finally this leaves the sum of £3,140.77 said to be demanded on 17th October 2011. This sum is not payable as a service charge. This is referred to as a balancing charge and yet it was conceded by the Applicants no proper accounts had been issued or balancing charges sought. Further in any event it appeared upon consideration with the current managing agents that in fact this was the balance outstanding on the Respondent's account when they took over management from David Pursey in respect of matters already demanded.

52. In summary the tribunal finds that in respect of service charges (including interim service charges) the sum payable by the Respondent for the period 24th June 2011 up to and including 25th December 2013 amounts to £7,150. It is for the county court to reconcile this decision with the sums claimed by the Applicant in the county court and to determine any additional matters including those relating to any additional claims made including ground rents, interest and the costs of this action.

53. We would ask the court to note that this tribunal was concerned as to the preparation of this case by the Applicant and the level of resources expended involving solicitors and counsel. Much of the accounts prepared and presented by the Applicant's and their managing agents were hard to unravel. In particular we would highlight the claim dealt with at paragraph 49 of this decision. Even at the hearing the Applicant still sought this sum despite the fact that upon questioning by the tribunal it became clear that this was the balance which Clifford Dann inherited when they took over from David Pursey (Management). This item should not have formed any part of this claim and would not have done so if everything had been adequately prepared. It is noticeable that no actual accounts have been prepared or presented to balance each of the service charge years in question. Clearly if this exercise had been undertaken on a proper annual basis many of the underlying issues may have been resolved. Until that exercise is completed the reasonableness and requirement to pay sums cannot be finalised and the fault for this must lie at the Applicant's door.

Judge D. R. Whitney

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX

Sections 27A and 19 of the Landlord and Tenant Act 1985

Section 27A 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.
(2)Subsection (1) applies whether or not any payment has been made.
(3)An application may also be made to a leasehold valuation 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.
(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 of an application under subsection (1) or (3).
(7)The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

19 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 provision 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.