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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/LSC/2013/0526**
Property	:	**Flat D, 165 Battersea Rise, London SW11 1HP**
Applicant	:	**163-165 Battersea Rise (Freehold) Limited**
Representative	:	**Mr S Purkis, Counsel**
Respondent	:	**Ms T Goodwin**
Representative	:	**In person**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**A Moloney (Pupil in Chambers) and A Gallagher (Director of Applicant company)**
Tribunal Members	:	**Judge P Korn (chairman)** **Mr P Casey, MRICS** **Mrs L Walter MA (Hons)**
Date and venue of Hearing	:	**2nd December 2013 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**6th January 2014**

DECISION

Decisions of the tribunal

(1) The tribunal notes that the parties have agreed that the correct service charge percentage payable by the Respondent is 25% and that the Applicant will need to adjust the amount charged to the Respondent accordingly.

(2) The tribunal notes that it has been agreed between the parties that the directors' insurance charges are not payable and that the Applicant will need to adjust the amount charged to the Respondent accordingly.

(3) The debt collection charges of £154 (inclusive of disbursements) are not payable.

(4) All other service charges which were the subject of the county court claim are payable in full.

(5) The tribunal declines to make a section 20C cost order.

(6) The tribunal determines that the Respondent shall not be required to reimburse the Applicant's application fee and hearing fee paid to the tribunal.

(7) For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the county court in relation to county court interest or fees.

The application

1. The Applicant seeks, and following a transfer from the county court dated 4th July 2013, the tribunal is required to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges charged to the Respondent and a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to the reasonableness and payability of certain administration charges charged to the Respondent.

2. The county court claim comprises the following sums:-

- First instalment of service charge for 2011/12 £1,657.12
- Second instalment of service charge for 2011/12 £629.82
- First instalment of service charge for 2012/13 £1,844.77

- Second instalment of service charge for 2012/13 £635.24

- Property Debt Collection Ltd's fees £154.00.

3. The relevant legal provisions are set out in the Appendix to this decision. The Respondent's lease ("**the Lease**") is dated 17th December 2007 and is between Christopher Charles Lumgair and Melanie Jane Wright (1) and the Respondent (2).

Applicant's case

4. Mr Purkis for the Applicant referred the tribunal to the service charge accounts for 2011/12 and 2012/13, these being the years to which the dispute related. He also referred to the service charge payment provisions in the Lease.

5. Specifically as regards the service charge percentage, Mr Purkis noted that the Respondent was being charged 23.41% in respect of external expenditure and 27.11% in respect of internal expenditure but conceded that this could not be justified under the Lease which in paragraph 1(4) of the Third Schedule defines the service charge as 25% of general expenditure and 25% of internal expenditure. Therefore the percentage payable by the Respondent was a flat 25%.

6. Mr Purkis drew the tribunal's attention to paragraph 1(2)(j) of the Third Schedule which defines as part of General Expenditure (for service charge purposes) *"the creation of such reserve funds against future liabilities as may seem prudent and desirable"*.

7. In relation to Property Debt Collection Ltd's fees and disbursements for chasing alleged service charge arrears, Mr Purkis submitted that this was covered by clause 3.15(a) of the Lease, which requires the lessee to pay to the lessor *"all costs charges and expenses ... which may be incurred by the Lessor of or in contemplation of any proceedings ... under Sections 146 and 147 of the Law of Property Act 1925 ... or in the preparation or service of any notice thereunder respectively and arising out of any default on the part of the Lessee ..."*.

8. As regards the categories of expenditure listed in the Maintenance and Service Charge Expenditure Accounts, Mr Purkis submitted that these tied in very well with the list of lessor's obligations in clause 7 of the Lease on which the lessee's service charge payment obligations were based.

9. Specifically in relation to the cost of obtaining insurance for the directors of the Applicant company, Mr Purkis submitted that paragraph 1(2)(g) of the Third Schedule entitled the Applicant to recover this sum as a service charge, but he simultaneously confirmed a

statement made in the Applicant's written statement of case that the sum of £239.84 – representing the Respondent's share of the cost of this insurance – would be credited to the Respondent's account "as a gesture of goodwill".

Respondent's response

10. The Respondent said that the building was not properly maintained and that the Applicant was not complying with its repairing responsibilities under the Lease. She therefore felt that the managing agents' fees should be reduced to reflect poor management.

11. More specifically, the Respondent felt that the Applicant was failing to comply with its obligations in relation to the flat roof. Whilst she conceded that the Lease expressly imposed responsibility for the surface of the flat roof on the lessee, she submitted that the Applicant as lessor remained responsible for the structure of the flat roof. As a consequence if there was a defect in the structure of the flat roof – which she believed there to be – this undermined her ability to keep the surface in good condition. She also said that the hallway was not being properly maintained.

12. The Respondent referred the tribunal to an extract from a survey report prepared by Keegans for the Applicant which expressed concerns about the standard of certain works. The extracts quoted include a statement that *"the entire single story and the upvc conservatory had been laid and installed with little consideration to Building Control Standards or even industry standard best practice, and it appeared to be a very poorly executed piece of 'DIY' style construction"*.

13. Generally in relation to repairing issues, the Respondent felt that the Applicant had prioritised other parts of the building and had neglected the parts of the building which were near to the Property.

14. As regards documentary evidence of her having complained about maintenance issues, the Respondent referred the tribunal to an email dated 29th May 2013 in which she complained that she had never seen a workman cleaning the gutters or inspecting the roofs and that living at the Property "gets worse and worse". Ben Hallows of the Applicant's managing agents replied to this email the same day stating – amongst other things – that the Applicant could not afford to incur costs for routine repairs or maintenance if lessees were withholding service charges due to historic matters, as the Respondent herself was doing.

15. The Respondent had concerns in relation to the electricity charges for 2012/13. Communal lights had been left on 24 hours a day, 7 days a week, and this wastage of electricity meant that the electricity charges were higher than they should have been.

16. The Respondent stated that she was not contesting the building insurance charges nor the cleaning charges.

17. The Respondent did not dispute the Applicant's right in principle to seek contributions towards a reserve fund but in practice she had no confidence in the managing agents.

18. The Respondent agreed that the correct service charge percentage was a flat 25%.

Applicant's follow-up comments

19. Mr Purkis emphasised the point that due to the withholding of service charge payments based on historic complaints the Applicant had limited funds available and was complying with its obligations to the extent possible with limited funds. The charges themselves were reasonable.

20. Mr Purkis said that the management charges were justified. Work had been done, but the lessor's repairing obligations were expressly stated to be conditional on the lessee paying the service charge and the Respondent had not been doing so. The flat roof was considered to be the Respondent's responsibility under the terms of the Lease.

21. In relation to the directors' insurance, the Applicant was now prepared on reflection to concede that the cost was not recoverable.

22. In relation to the electricity charges, whilst the Applicant believed these to be reasonable it was prepared to offer a compromise whereby if the actual electricity charges for 2013/14 turn out to be lower than those for 2012/13 the Applicant will refund to the Respondent the difference between the 2012/13 and 2013/14 charges. This compromise offer was not accepted by the Respondent.

Tribunal's analysis and determinations

Service charge percentage

23. The parties are in agreement that the correct service charge percentage is a flat 25% and therefore there is no dispute on this point requiring a determination by the tribunal.

Directors' insurance

24. The Respondent has conceded that the Respondent's share of the directors' insurance is not recoverable and has agreed to reimburse it to

the Respondent, and so again there is no dispute on this point requiring a determination by the tribunal.

Building insurance, administrative & bank charges and cleaning

25. The Respondent is not disputing the payability of the building insurance premiums or the administrative/bank charges (save to the extent that they include directors' insurance) or the cleaning charges, and the Applicant has provided sufficient evidence by way of copy service charge accounts, lease interpretation and background information to enable the tribunal to be satisfied on the balance of probabilities that these are all properly payable.

Repair

26. As regards the repairing charges, the Lease permits the lessor to recover the cost of complying with its repairing obligations and the Respondent has not identified any charges which fall outside the service charge recovery provisions of the Lease. The Respondent's position seems to be that parts of the building are in disrepair and that the Applicant has acted unreasonably in the way in which it has prioritised repairs and has not attended to the structure of the flat roof.

27. The tribunal considers the Respondent's case to be very weak from an evidential perspective on these issues. The Applicant readily concedes that the building is not in perfect condition and states that the reason for this is the withholding of service charge payments which has limited the amount of funds available to carry out the work. There is a legitimate debate to be had as to whether such disrepair as may exist constitutes a breach of the lessor's repairing covenants, but this is a matter for the county court.

28. The issue for the tribunal in relation to repair is whether the amount paid by the Respondent by way of service charge is unreasonable, whether because it does not represent value for money or because she has been charged for work which was not carried or for some other reason. She has failed to provide any evidence that the amounts charged for repair and maintenance are unreasonable in relation to the work done, and therefore on the basis of the information provided by the Applicant the tribunal is satisfied on the balance of probabilities that these charges are properly payable.

Management charges

29. Whilst it is possible that the management of the building has been unsatisfactory, again the Respondent has failed to provide proper evidence to back up her claims. She has given the impression of a long-running dispute in which she has frequently raised serious concerns

which have then been ignored or not attended to. However, when pressed to give evidence of her having raised concerns and of the managing agents not responding, all that she was able to produce was an email from her dated 29th May 2013 which was responded to that same day. Whilst she may not have been happy with the response, it did address the points made by her and explained that the Applicant did not feel able or contractually obliged to spend money on routine maintenance whilst she was withholding so much by way of service charge.

30. Specifically in relation to the flat roof, the Lease requires the lessee *"within six months of the date [of the Lease] to repair the flat roof ... so as to make the same thoroughly water-tight (in a way that has a reasonable life expectancy) at the expense of the Lessee"*. This obligation is not stated to be limited to the surface of the flat roof, and therefore it is arguable that it applies to the whole of the flat roof, although in the absence of a detailed definition it is not obvious what is included and excluded by the simple words "the flat roof". In addition, it is arguable that the lessee's obligation was merely to repair the flat roof on a one-off basis and then the lessor would take over responsibility from that point. There is also insufficient evidence for the tribunal to be clear whether the Respondent has at any point repaired the flat roof so as to make it thoroughly water-tight, although such evidence as has been produced suggests that she has not been able to do so.

31. Taking all of the above points into account, the tribunal is not satisfied that the Respondent has demonstrated that the Applicant and/or its managing agents have neglected their responsibilities in respect of the flat roof in a manner which constitutes poor management.

32. As regards the extracts from Keegans' survey report quoted by the Respondent, these do appear to indicate (assuming that they have not been taken out of context) that some works at some point were not carried out in a workmanlike manner. However, the Respondent's challenge on this point is not nearly sharp enough. She seems unclear whether the challenge is to repairing charges or to management charges. If the challenge is to repairing charges, which charges and on what basis are they considered to be too high? If the challenge is to management charges, much more detail is needed as to what management decisions were taken when, whether she objected in writing, whether there were adequate responses, what evidence she has that this was a failure of management at all and, if so, whether this was a one-off failing or a pattern of failure. In addition, this sharper and more detailed analysis needed to be put to the Applicant in writing well before the hearing so as to give it a full opportunity to consider the Respondent's detailed challenge and respond properly to it.

33. Following on from the above point, in its directions the tribunal made it very clear how the Respondent was expected to particularise her defence/response to the Applicant's claim/application, but in the tribunal's view she has failed to follow those directions to the detriment of her case.

34. The tribunal fully accepts that even **legitimate** non-payment of service charge can sometimes be used by managing agents and landlords as a justification for failure to provide services, but in this case the Respondent has not provided proper evidence to justify her withholding of service charge payments or proper evidence of management failings, and in addition – whilst there could be questions as to how far this point extends in practice – the Applicant's repairing obligations are expressed to be conditional on payment of the service charge.

Reserve fund

35. The Respondent's only basis for challenging the sinking fund contributions is that she has no confidence in the managing agents. The Respondent has not provided any proper evidence to justify her comments and the Lease allows the lessor to create a reserve fund. In addition, there is no specific challenge to the size of, or reason for, any requested contribution to the reserve fund. Accordingly, the items described as sinking fund (i.e. reserve fund) contributions in each year are fully payable.

Electricity charges 2012/13

36. In relation to the electricity charges, the Applicant's offer of compromise was not accepted by the Respondent and therefore the Applicant is not bound by it.

37. The tribunal notes that there is no electricity charge for 2011/12, and therefore it may well be that the electricity charge for 2012/13 is in fact a combined charge for both years. If that is the case then a total charge of £457 for that period for the cost of supplying electricity to the communal areas does not seem to the tribunal to be unreasonable.

38. Whilst the tribunal accepts, in principle, that if the communal lights were left on throughout the day this will have constituted a waste of money if there existed a low cost and easy way to remedy this problem, ultimately again the Respondent's case suffers from lack of evidence. Insufficient evidence has been provided to show that the electricity could have been supplied in a cheaper, but equally effective, manner and the Respondent has provided no evidence to show that the charge of £457 is unreasonably high.

39. Accordingly, the electricity charges for 2012/13 are payable in full.

Debt collection charges

40. Mr Purkis submitted that these were recoverable under the Lease by virtue of the provisions on clause 3.15(a) (see paragraph 7 above). The tribunal disagrees with this analysis. Clause 3.15(a) of the Lease is limited to recovery of costs incurred under or in connection with Sections 146 and 147 of the Law of Property Act 1925. The former relates to forfeiture proceedings and the latter to dilapidations. This was not a dilapidations claim, and whilst it is arguable that a determination that unpaid service charges are properly payable could later form the basis of forfeiture action, no evidence has been provided which indicates that forfeiture proceedings were contemplated.

41. The general established principle is that payment clauses in leases are construed, in cases of ambiguity, in favour of the paying party, and accordingly the tribunal considers that this clause is not wide enough to cover the debt collection company's charges.

Cost Applications

42. The Respondent applied for an order under section 20 of the 1985 Act that the Applicant should not be entitled to add its costs incurred in connection with these proceedings to the service charge. In view of the fact that that the Applicant has succeeded on most issues the tribunal declines to make a section 20C order. Therefore the Applicant can add its reasonable costs incurred in connection with these proceedings to the extent (if at all) that the Lease allows for these costs to be recovered.

43. The Applicant made an application for reimbursement by the Respondent of the application and hearing fees. Whilst it is for the county court to decide the position in relation to the county court fee, in relation to the balance of the application fee and the tribunal hearing fee, the tribunal does not consider that these should be reimbursed by the Respondent. Whilst the Applicant has been successful on most issues, it has not been successful on all of them and it has conceded certain points including its failure over an extended period to charge the correct service charge percentage.

44. There were no other cost applications.

Name: Judge P Korn **Date:** 6th January 2014

Appendix of relevant legislation

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.

Schedule 11 to Commonhold and Leasehold Reform Act 2002

Paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.