



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UG/LIS/2015/0055

Property : Flat C, 34 Harmer Street, Gravesend, Kent
DA12 2AX

Applicant : Southern Land Securities Limited

Representative : Montclare Campbell Counsel

Respondent : Mr and Mrs S Clark

Representative : Mr Clark

Type of Application : Liability to pay service charges

Tribunal Member(s) : Judge Tildesley OBE
Mr N Maloney FRICS FIRPM MEWI

Date and Venue of Hearing : 10 February 2016 Medway Magistrates
Court, The Court House, The Brook,
Chatham, Kent ME4 4JZ

Date of Decision : 3 March 2016

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the Respondents are liable to pay a balancing charge for 2013/14 of £253.57 instead of £729.79 as set out in the statement of account as at 20 June 2014.
2. The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that none of the Landlord's costs of the Tribunal proceedings may be passed to the Respondents through any service charge.
3. The Tribunal transfers the case back to the County Court for determination including costs and fees. The Tribunal asks the County Court to note its observations on the Applicant's costs in connection with the Tribunal proceedings at paragraph 71.

The Application

4. Proceedings were originally issued in Northampton CCMCC County Court under claim number A47YP735. The claim was transferred to the Dartford County Court and then in turn transferred to this Tribunal by order of District Judge A Smith on 11 August 2015.
5. The amount of the claim was £2,613.32 as at 9 September 2014 plus statutory interest, costs and court fees.
6. District Judge A Smith required the Tribunal to answer the following question:

“The question of reasonableness and amount of service charges recoverable by the Claimant from the Defendant (if any) shall be referred to the First-tier Residential Property Tribunal together with any other disputes in this claim and within their jurisdiction”.

7. The Tribunal directed a case management hearing by telephone on 13 October 2015. The parties did not participate in the case management hearing. The Tribunal issued further directions requiring the Respondent to identify the items in dispute and why. The Tribunal originally ordered a determination on the papers but after receipt of the documents bundle the Tribunal directed an oral hearing to decide the dispute.
8. The relevant legal provisions are set out in the Appendix to this decision.

The Issues

9. The Respondents' case was set out in their letter dated 8 November 2015. Their challenge was restricted to specific items of expenditure for

the year ended 31 March 2014, and did not include expenditure items from other years.

10. The Respondents in their case dated 8 November 2015 disputed the following expenditure items in the certified service charge accounts for the year ended 31 March 2014:
 - Alarm/Emergency lighting
 - Repairs
 - Surveyors and professional fees
 - TV system
11. The total amount of service charge in dispute was £3,628.17 of which the Respondents were liable to pay 20 per cent, namely, £725.63.
12. Mr Brendan Milward, Para-Legal, provided the Applicant's reply to the Respondents' statement of case which was dated 17 December 2015.

The Hearing

13. The Applicant was represented by Montclare Campbell, counsel at the hearing. The Applicant called Mr Paul Lloyd of Hamilton King, managing agent as a witness. Mr Stephen Clark appeared for the Respondents.
14. The Tribunal admitted an agreed documents bundle in evidence prepared by the Applicant in accordance with the directions. The Tribunal notes that the Applicant did not paginate the bundle except for the section containing the invoices. The Tribunal requests the Applicant to be mindful in future of paginating the entire bundle which enables the smooth running of the proceedings.
15. Immediately prior to the hearing Mr Campbell applied for permission to call Mr Lloyd as a witness even though Mr Lloyd had provided no witness statement. Mr Clark raised no objections to the application. The Tribunal gave leave for the Applicant to adduce Mr Lloyd's testimony but reserved its position on the weight to be attached.

The Background

16. The property is an upper floor flat in a mid-terrace position of Georgian buildings of five storeys which was built in 1840 and subsequently converted into three self-contained flats. Originally the Georgian building was mixed use of shop and house.
17. As well as the upper floor flat, there is a single unit constructed over the basement and ground floor and a further maisonette over first and second floors.

18. The front of the building opens onto a pavement of a busy one-way thoroughfare for road traffic. At the rear there is an enclosed garden with parking for cars beyond the fence but within the boundaries of the freehold.
19. The Georgian building has a shallow pitch roof with front and rear facing parapets with the external surfaces being a mixture of brick face and stucco finishes. The windows are the original timber sash type constructed within a concrete sill.
20. The Tribunal inspected the common areas of the Georgian building before the hearing in the presence of Mr Lloyd and Mr Clark.
21. The Tribunal is of the view that the communal entrance and stair case were in poor decorative condition and with plaster coming off the walls. The staircase had partial carpeting which was dirty and worn.
22. The Tribunal noted there were two emergency lighting units on the ground floor, and one unit on the second floor mezzanine. The lighting units were connected to the mains electric supply with battery back-up. The lighting units, however, did not have an isolating switch which would enable them to be tested without turning off the mains electricity supply.
23. The Tribunal saw two battery powered smoke alarms. One of which was immediately above the entrance to the upper floor flat. The other was installed on the ceiling of the second floor mezzanine, which was the only one tested during the inspection. The Tribunal observed a cat flap in the door of the second floor maisonette which compromised the integrity of it to act as a fire resistant door.
24. The Tribunal saw odd bits of furniture and debris on the mezzanines. The store room off the lower staircase was full of rubbish.
25. The Tribunal inspected the meter box and the work done to amplify the television signal to each of the flats.
26. The Respondents hold the property under the terms of the lease made on 10 March 1988 between Michael Exeter of the one part and David Robertson Featherstone of the other part for a term of ninety nine years from the quarter day previous to the 10 March 1988.
27. Under clause 4(4)(i) the lessee covenants to pay the lessor a service charge which is payable in advance for the next ensuing year (1 April to 31 March).
28. Clause 4(4)(iii) authorises the recovery of a balancing charge at the end of the service charge year following the service of the auditor's certificate. Clause 4(4)(iii) states that

“Within twenty eight days of the service of the certificate of the auditors referred to in the fifth schedule to pay to the lessor as an annual service charge twenty per cent of the cost (calculated as provided in the Fifth Schedule hereto) of providing services and other things specified in the Sixth schedule hereto”.

29. Clause 4(4)(v) specifies that payment of the service charge operated as condition precedent to the performance by the lessor of the lessor's covenants under the lease.
30. The Sixth Schedule defines the services for which the lessor can recover the costs of providing them through the service charge. The services include repair and maintenance of the building structure, insuring the building and the lessor against specific risks, and administering the demised premises and building including the appointment of managing and other agents, surveyors and accountants.

Discussion

31. The Tribunal intends to deal with each disputed item in turn. The charges are set out in the Income and Expenditure Account for the year ended 31 March 2014. Crawford Accountants Limited provided a report of factual findings about the service charge accounts issued by the Respondents' managing agent which was dated 17 June 2014 for the 2013/14 accounts. The accountants found the entries in the accounting records checked by them were supported by receipts and other documentation inspected.

Alarm and Emergency Lighting and Repairs

32. The amount spent in the year ended 31 March 2014 on alarm/emergency lighting was £588, and £605.04 on repairs. The Tribunal has combined these two heads of expenditure because they involve monies spent on emergency lighting.
33. The Applicant adduced invoices from S & T Electrical of Manningtree Essex to substantiate the expenditure for the budget head alarm/emergency lighting, which were:
 - £72 (including VAT) dated 9 May 2013 for attending site and provide an electrical schedule [87].
 - £162 (including VAT) dated 14 August 2013 for contract visit [88].
 - £147.84 (including VAT) dated 16 December 2013 for contract visit [92].
 - £144 (including VAT) dated 12 February 2014 for contract visit [93].
34. The Applicant adduced invoices from S & T Electrical of Manningtree Essex to substantiate the expenditure for the repairs budget head, which were:

- 9 August 2013 £372 (including VAT) attending site and replacing three faulty light fittings [69].
 - 21 August 2013 £295.20 (including VAT) attending site due to recent fire and trace and identify cabling to enable the communal and external lighting to function correctly [90].
35. The sums of the individual invoices for each budget head did not correspond with the total recorded in the accounts (£525.84 invoice against £588 alarm and emergency lighting budget; £667.20 invoice against £605.04 on repairs). However, the sum of the two sets of invoices equalled the sum of the two budget heads combined, namely £1,193.04.
36. The Applicant contended the installation of emergency lighting and its regular testing were necessary to ensure the safety of the occupiers of the property. The Applicant pointed out that the Respondents had not produced evidence to suggest the charges were excessive.
37. The Applicant relied on a report from a consultant, Help and Safety at Work Limited, which had carried out a Fire Risk Assessment of the property on 12 February 2013. The consultant had recommended the provision of a service contract with a competent contractor who should maintain and test the electricity lighting and the fire alarm system every three months. A copy of the consultant's report was included in the bundle.
38. Mr Clark stated he ran an electrician contractors' business. He considered the charge of £120 for the testing of emergency lighting excessive, and suggested a figure of £60 as being more reasonable. Mr Clark noted that the electrical contractors engaged by the Applicant were based in Manningtree which involved a 150 mile round trip to the property.
39. Mr Clark was of the view that the emergency lighting saw at the inspection had been installed recently and was not the lighting referred to in the invoices produced by the Applicant. Mr Clark said the emergency lighting had not been put in the correct place and that the lights did not have an inbuilt test facility.
40. The Tribunal is satisfied that the terms of the lease enabled the Applicant to recover the expenditure on the emergency lighting through the service charge. Mr Clark made no argument about whether the costs of the installation and or the renewal of emergency lighting was covered by the landlord's repairing covenant under the lease.
41. The Tribunal finds the Respondents adduced no persuasive evidence that the costs charged by the Applicant for the repair of the emergency lighting and cabling and the quarterly inspection and testing of the emergency lighting were excessive. The Tribunal also finds that the works connected with the emergency lighting were necessary.

42. The Tribunal considers, however, that the replacement of the lighting was not to the required standard. The Tribunal agrees with Mr Clark that the lighting was inadequate in that the location of the units would not ensure safe passage along the stairs in the event of a fire. Further the Tribunal is of the view that the system should have incorporated an isolation switch which would have enabled them to be tested without switching off the mains.
43. The Tribunal, therefore, reduces the charge of £372 dated 9 August 2013 by 50 per cent to reflect the fact that the installation was not to the required standard.
44. The Tribunal relies on the charges as specified in the invoices and determines that charges of £525.84 and £481.20 have been reasonably incurred for alarm/emergency lighting and repairs respectively.

TV System

45. The Applicant incurred £191.34 on replacing the amplifier for the television signal to the three flats in the building.
46. The Applicant adduced an invoice from 1st Call R B Installations to substantiate the expenditure. The invoice recorded as follows
- “Also note existing cabling is non screened cabling and not approved for reliable viewing”.
47. The sole issue between the parties was whether the works were necessary. Mr Clark argued it was pointless amplifying the signal if the cabling was not to the required standard. Mr Campbell contended that the work had been done and Mr Clark had produced no evidence challenging the reasonableness of the costs.
48. The Tribunal notes that Mr Milward’s evidence in the Applicant’s statement of reply was that
- “There was no reference to the property having a communal aerial, and consequently it may be that the aerial repaired was in fact dedicated to the basement flat”.
49. The Tribunal agrees with Mr Clark, and considers that the amplifier should not have been installed until the problems with the cabling had been resolved. The Tribunal disallows the amount of £191.34.

Surveyors and Professional Fees

50. The disputed amounts comprised three separate charges for surveyors and professional fees. The first charge concerned an amount of £240 which was for professional services in connection with the presence of asbestos in the property. The second and third charges were for

surveyors' fees of £383.08 and £1,629.71 in connection with proposed internal and external repairs and decorations.

51. The Tribunal starts with the first charge which was substantiated by an invoice from Development Survey Services Limited dated 1 July 2013.
52. The Applicant stated that it was necessary to survey the property for the presence of asbestos before major works were undertaken. Mr Clark had no knowledge of this survey being carried out. Mr Clark pointed out that the Applicant had adduced no evidence of the outcomes of the survey, such as a certificate or a report on the asbestos in the property.
53. The Tribunal is satisfied the invoice from Development Survey Services Limited was sufficient evidence that the Applicant had incurred the costs of an asbestos survey. The Tribunal is also satisfied that the Applicant was entitled to recover the costs of the survey from the Respondents under paragraph 3 of the Sixth schedule to the lease. There was no evidence to suggest that the cost of £240 was excessive. The Tribunal finds that the Applicant acted reasonably in commissioning an asbestos survey because it was a necessary part of managing the risks associated with the building. The Tribunal determines that the costs of £240 had been reasonably incurred on the asbestos survey.
54. The Applicant called Mr Lloyd to speak to the charges for the surveyors' fees of £383.08 and £1,629.71. The documents bundle contained no invoices and no supporting documentation in respect of the fees.
55. According to Mr Lloyd, the charges were incurred on drawing up the specification and evaluating the tenders for the proposed major works to the property. Mr Lloyd said that the major works did not proceed because some of the leaseholders were not prepared to pay for the works. Mr Lloyd believed that the amount of fees would have been calculated as a percentage of the total cost of the proposed works.
56. Mr Lloyd when questioned by the Tribunal had no personal knowledge of the works done by the surveyors. Mr Lloyd had not seen any of the documentation in connection with the proposed works and had not interrogated the managing agent's computer to access relevant details.
57. Later on in the proceedings Mr Lloyd found two memoranda in his brief case, one dealing with the internal major works and the other with the external major works. The documents attached to each memorandum were the section 20 notice of intention dated 17 November 2010, letter accompanying schedule of works dated 10 September 2012, notice of estimates dated 14 August 2013, and letter to lessees dated 25 September 2013.

58. Mr Campbell applied for the memoranda and accompanying documents to be admitted in evidence. Mr Clark did not object to the application. The Tribunal admitted the documents but reserved its position on the lateness of the delivery of the documents, and on the weight to be attached.
59. Mr Clark stated that the Applicant sent him an invoice for £14,000 in relation to the proposed major works. Mr Clark informed the Respondent's managing agent that he was not prepared to pay the invoice until he was given a breakdown of the proposed works. According to Mr Clark, Mr Cummings of the managing agent had promised to supply him with a schedule of works but no schedule had been sent.
60. The Tribunal considers the Applicant's preparation in connection with the disputed surveyor's fees highly unsatisfactory. The Applicant included no documentation substantiating the fees in the bundle. Further the Applicant called a witness who had no personal knowledge of the circumstances surrounding the fees charged. Finally the Tribunal is troubled by the Applicant's intention to charge for surveyors' fees in connection with a major works programme which was later abandoned without adequate reason. The Applicant said that it had no obligation to carry out repairs if the leaseholders were not prepared to reimburse the costs of those repairs. On Mr Clark's evidence the Applicant simply withdrew the charge for major works without attempting to change Mr Clark's decision on payment by providing him with the necessary information or seeking a declaration from the Tribunal that their intended proposals for work were reasonable.
61. The Tribunal's primary position is that it would be contrary to the overriding objective of dealing with this case fairly and justly by allowing the Applicant to rely on the memoranda. The Applicant has failed to comply with the directions issued on 13 October 2015 requiring the Applicant to supply the Respondents and the Tribunal with copies of all relevant invoices relating to the disputed matters together with any other documents upon which the Applicants rely. The Respondents were litigants in person and had no sight of the documents until the actual hearing. Finally the witness called by the Applicant was unable to speak to the documents.
62. In the alternative, the Tribunal finds that the documents attached to the memoranda were of no assistance to the Applicant's case for the surveyors' fees.
63. The Tribunal is satisfied from the contents of the letter dated 12 September 2012 attaching a copy of the schedule of works, the surveyors would have completed their work by the end of 2012, and that no surveyors' fees in connection with the major works would have been incurred in 2013/14.

64. The Tribunal observes that the Applicant did not send out the notice of estimates until 14 August 2013 which was some ten months after return of the tenders on 14 October 2012. In the Tribunal's view, the Applicant's delay with the notice of estimates would have undermined the tenders and the work done by the surveyors in evaluating those tenders.
65. The Tribunal decides that the Applicant has adduced no persuasive evidence to substantiate the surveyors' fees of £383.08 and £1,629.71. The Tribunal, therefore, disallows the fees.

Summary of the Tribunal's determination

66. Mr Clark expressed his disquiet about the general condition of the property and the absence of effective management. Whilst the Tribunal acknowledges Mr Clark's concern, the Tribunal is restricted to examining charges specifically identified by Mr Clark in his defence to the County Court proceedings dated 11 November 2014, and in his statement of case dated 8 November 2015. In this respect the Tribunal determines that the following charges are payable:

Alarm and Emergency Lighting	: £525.84
Repairs	: £481.20
TV System	: Nil
Surveyors' Fee (Asbestos)	: £240
Surveyors Fee (Major works)	: £Nil
Total	: £1,247.04

67. The Respondents' contribution to the above charge is £249.41 compared with the £725.63 claimed by the Applicant.
68. The Tribunal determines that the Respondents are liable to pay a balancing charge for 2013/14 of £253.57 instead of £729.79 as set out in the statement of account as at 20 June 2014¹

Application under S20C and costs

69. The Tribunal invited the parties' representations on an order under Section 20C of the 1985 Act. The Tribunal determines that it is just and equitable in the circumstances for an order to be made under Section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.
70. The Tribunal took into account the Applicant's inadequate preparation and the favourable outcome for the Respondents in respect of the disputed matters when deciding that it was just and equitable to make an order under section 20C.

¹ = £729.79 – (£725.63 -£249.41)

71. The Tribunal finds the Applicant's preparation for the hearing was wholly unsatisfactory. The document bundle was not paginated, and did not include all relevant invoices and documents which were clearly in the possession of the Applicant (from the additional documentation introduced at the hearing). The Applicant supplied no witness statements but nevertheless called a witness who had no personal knowledge of the property and the disputed charges. The Tribunal has no criticism of Counsel who did his best in a difficult situation. The Tribunal makes these observations if in the event the Court is asked to order costs against the Respondents in connection with the Tribunal proceedings.

RIGHTS OF APPEAL

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

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.

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.