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

Case Reference : LON/00AM/LSC/2016/0008

Property : Flat 2, 171B Amhurst Road,
Hackney, London E8 2AW

Applicant : Mr T A Draper

Representative : In person

Respondent : Jonathon Howard Gershinson (1)
Louisa Jane Brooks (2)
(acting as the joint fixed receivers
for the Property)

Representative : Mr C Sharpe of L R Solicitors

Type of Application : For the determination of the
reasonableness of and the liability
to pay a service charge

Tribunal Members : Ms N Hawkes
Mr P Roberts DipArch RIBA

Date and venue : 10 Alfred Place, London WC1E 7LR

**Date of Paper
Determination** : 17th March 2016

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that management fees claimed by the respondents are not payable by the applicant under the terms of the lease.
- (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 lessees through any service charge.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the applicant in respect of the service charge years 2014 and 2015.
2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. The Tribunal has been informed that the property which is the subject of this application is a flat within a five floor, terraced, converted building of which the London Borough of Hackney is the freehold owner.
4. The basement of the building is known as 171A Amhurst Road and contains one flat with its own separate entrance. The upper three floors of the building are known as 171B Amhurst Road and there is a self-contained flat on each floor (Flats 1, 2 and 3, 171B Amhurst Road).
5. Flats 1 and 2 are both two bedroom flats and Flat 1 is a one bedroom flat. The common areas within 171B Amhurst Road are staircases and corridors which connect the flats, and also a small storage room.
6. The head lease of 171B Amhurst Road is registered under title number EGL454856. The registered owners are Nasreen Hussain and Mahar Hussain who purchased the leasehold interested in 1999. Their interest is subject to a registered charge dated 31st July 2003 held by National Westminster Bank Plc ("the lender").
7. On 9th February 2012, the respondents were appointed as joint fixed charge receivers on behalf of the lender. In accordance with the deed of appointment the respondents have the power and authority to manage the property and Allsop Letting and Management Limited

("Allsop") have been appointed to act as managing agents on behalf of the respondents.

8. No party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
9. The applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

10. In the application, the applicant identified the relevant issues for determination as follows:
 - (i) The payability and/or reasonableness of service charges for the year 2014 relating to cleaning; the common parts electricity supply; insurance; general repair and maintenance; health and safety signs; and the management fee.
 - (ii) The payability and/or reasonableness of service charges for the year 2015 relating to cleaning; the common parts electricity supply; insurance; general repair and maintenance; health and safety signs; and the management fee.
11. The respondents state that the applicant has used the estimated service charge figures for 2014 and 2015 in the application and that the actual figures are now available for the year ended 31st March 2015.

The year ended 31st March 2015

Cleaning

12. The respondents state that nothing has been charged for cleaning. Accordingly, the Tribunal notes that no service charge relating to the provision of cleaning is payable by the applicant in respect of the year ended 31st March 2015.

Common Parts Electricity Supply

13. The respondents state that the applicant has not been charged for a common parts electricity supply as alleged. Accordingly, the Tribunal notes that no service charge relating to the provision of electricity to the common parts is payable by the applicant in respect of the year ended 31st March 2015.

Insurance

14. The applicant's contribution to the cost of insurance is £583.35. The respondents state that, although the lease obliges the respondents to insure the property, Allsop has recently ascertained that the freeholder insures the building which includes the property and charges the respondent for the provision of insurance.
15. The respondents explain that, having regard to the duplication of the buildings insurance, the respondents agree to credit the applicant the sum of £583.35 in respect of the insurance charges for the period ending 31st March 2015. Accordingly, the Tribunal notes that no service charge relating to the cost of insurance is payable by the applicant in respect of the year ended 31st March 2015.

General Repair and Maintenance

16. The respondents seeks to recover the sum of £1,332 in total under this heading and a contribution of £499.50 from the applicant. It is not in dispute that the applicant is to pay 37.5% of the applicable charges.
17. The applicant wishes it to be noted that he views the costs as excessive but, nonetheless, he has informed the Tribunal that he does not wish to contest this figure and he has provided no evidence or legal argument in opposition.
18. Accordingly, the Tribunal finds that the sum of £499.50 is payable by the applicant in respect of general repair and maintenance in the year ended 31st March 2015.

Repairs and Maintenance – Electrical

19. The respondents seek to recover the sum of £600.12 in total under this heading and £225.04 from the applicant. The applicant wishes it to be noted that he views the costs as excessive but, nonetheless, he has informed the Tribunal that he does not contest this figure and he has provided no evidence or legal argument in opposition.

20. Accordingly, the Tribunal finds that the sum of £225.04 is payable by the applicant in respect of electrical repairs and maintenance in the year ended 31st March 2015.

Health and Safety Signs

21. The respondents state that the applicant has not been charged for health and safety signs as alleged. Accordingly, the Tribunal notes that no service charge relating to the provision of health and safety signs is payable by the applicant in respect of the year ended 31st March 2015.

Asbestos Survey

22. There is no reference to an asbestos survey in the applicant's application. However, the Tribunal notes that the applicant states that the does not contest a total figure of £180 for an asbestos survey to 171B Ashurst Road.

Management fees

23. The reasonableness and payability of the management fee remains in dispute.

The year ending 31st March 2016

24. The applicant no longer seeks a determination of reasonableness of the estimated service charge for the year ending 31st March 2016 save insofar as it comprises an estimated management fee.
25. Accordingly, the sole matters currently in dispute are the actual management fee for the year ended 31st March 2015 and the estimated management fee for the year ending 31st March 2016.

The management fees

26. The respondents seek to recover a fixed management fee of £310 plus VAT from the applicant. The Tribunal considers that the management fees claimed by the respondents are not at the lowest end of the range for such fees but nevertheless finds that they are within the range of reasonable management fees for the management of a property of this type. However the management fees will only be recoverable by the respondents if they are payable under the terms of the applicant's lease.
27. The respondents rely upon clauses 1.8.1 and 3.37 of the lease in seeking to recover management fees. Clause 3.37 provides:

3.37 at all times to observe and perform all regulations that the Landlord may from time to time in his absolute discretion think fit to make for the management care and cleanliness of the Building and the comfort safety and convenience of all its occupants.

28. The Tribunal has been provided with no evidence that any regulations have been made under clause 3.37 and, in any event, the service charge is expressly defined at clauses 1.7 to 1.8.2 of the lease:

1.7 'the Service Charge' means:

1.8.1 the cost to the Landlord from time to time of contributing towards the repairs and maintenance of the common parts and main structure of the building including the roof, foundations and all party structures for the benefit of the building as a whole to include the insurance premium incurred by the Landlord for insuring the building.

1.8.2 all of any increased premium payable by reason of any act or omission of the Tenant.

29. The respondents also contend that "the provision of management services would be implied by custom given that it is generally accepted that management agents are employed to block manage conversion properties".
30. Neither party has referred the Tribunal to any specific legal authority. Paragraph 7.170 of Woodfall: Landlord and Tenant provides as follows (emphasis added):

*"As a general rule the cost of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides. However, where the landlord was a residents' company with no funds of its own, it was held that a term should be implied to the effect that it had power to incur necessary administrative expenses, including employing a firm of managing agents, and to recover such expenses from the lessees. Where a lease provided for the recovery of the **total** cost of providing certain services, it was held that management costs relating purely to the provision of those services (but not those associated with rent collection or other services not specified) were recoverable. It has been held that the cost of collecting rent is not recoverable as part of a management charge. A charge for management and administration may not be recoverable where no relevant services have been provided during the year in question."*

31. The express definition of service charge in the lease does not include a charge for the cost of employing managing agents. The services listed

by the respondents in the statement of case as having been carried out by the managing agents include:

- (i) *Opening and handling bank accounts.*
- (ii) *Preparing and sending out service charge budgets.*
- (iii) *Collecting service charge contributions including sending demands and associated summaries and any required statements.*
- (iv) *Processing payments relating to the Property within expenditure limits.*
- (v) *Accounting for service charges.*
- (vi) *Providing information to accountant prior to the preparation of annual service charge accounts.*
- (vii) *Using best endeavours to collect and on-going routine service charge arrears.*
- (viii) *Viewing, without the use of inspection equipment, the common parts of the Property to check condition and deal with any necessary repairs other than major repairs.*
- (ix) *Organising periodic health and safety checks and ensuring appropriate risk assessments are in place.*
- (x) *Visiting the property.*
- (xi) *Dealing with day-to-day lessee issues and reporting to and taking instructions from the client on lessee's dissatisfaction.*
- (xii) *Advising the client on all relevant legislative and regulatory issues and general interpretation of leases.*
- (xiii) *Maintaining adequate/suitable files and records on the management of the Property.*
- (xiv) *Keeping records of residents tenancy details.*

(xv) Advising and liaising with the client on management policy.

32. This clearly goes beyond the management costs relating purely to the provision of the services specified in the lease. Further, there is no reference to "total" costs in the service charge clause. Accordingly, the Tribunal finds that the management fees are not payable under the terms of the lease.

Application under s.20C

33. In the application form, the applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, 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 landlord may not pass any of its costs incurred in connection with these proceedings before the Tribunal through the service charge.

Name: Judge N Hawkes

Date: 17th March 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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.