11252

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2015/0294**
Property	:	**27 St Saviours Wharf, Mill Street, London SE1 2BE**
Applicant	:	**Anne Pounds**
Respondent	:	**1. St Saviours Wharf Management Ltd** **2. St Saviours Wharf Co.Ltd**
Representative	:	**1. No attendance** **2. Neil Chapman, Director**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Ruth Wayte** **Michael Mathews FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**15 January 2016**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £12,556.33 is payable by the Applicant to the Second Respondent in respect of the service charges demanded from 12th December 2013 to 31 December 2015.

The application

1. The Applicant issued an application pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of liability to pay and reasonableness of service charges demanded from 2009 to 2015.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person at the hearing. The First Respondent did not appear and was not represented. Neil Chapman, Director, appeared to represent the Second Respondent, supported by fellow directors Giancarlo Lovino and Deborah Stuart and also Elizabeth Hurry who has assisted with the management of the property over a number of years, currently as Currell Management.

The background

4. This dispute arises out of a complicated history of leaseholder management companies. The property which is the subject of this application is a riverside wharf originally converted into 47 residential and 11 commercial units, three of which subsequently changed their usage to residential in 2010. The Applicant's lease is dated 9 February 1988. In addition to the freeholder (currently the Manhattan Lofts Corporation) and leaseholder, the third party to the lease was the First Respondent, a lessee-owned management company. The intention was that the First Respondent would take on all the management obligations under clause 7 of the lease, which could include employing managing agents. However, under clause 8 of the lease the Lessor could serve a notice taking all or any of those management obligations back, including the right to collect the service charge.

5. In 1994, a second lessee-owned company called St Saviours Wharf Lessees Limited was formally appointed as managing agents to the First Respondent. Elizabeth Hurry was subsequently appointed as an "administrator"/agent to that second company and since then all service charge demands and other documentation were produced by Ms Hurry's various trading entities. St Saviours Wharf Lessees Ltd was

wound up in September 2012 as by that time the intention had been to pass the management of the building to a third company as set out below.

6. In 2009 the Freeholder granted an intermediate or overriding lease to the Second Respondent, which is also lessee-owned. There were 46 original members of that company, who subsequently extended their leases to 999 years, surrendering their original lease. The Applicant, who lives in Ireland, did not participate in the lease extension exercise which left her as one of the few leaseholders with an original lease. By virtue of their overriding lease, the Second Respondent satisfied the definition of "Lessor" in the original lease and served a series of notices under clause 8 purporting to take over the management obligations from the First Respondent.

7. The Applicant did not pay the sums demanded by the Second Respondent, who applied for a determination under section 27A of the 1985 Act. However, the First Tier Tribunal in the case of *St Saviours Wharf Company Ltd v Pounds 9 January 2014* (LON/00BE/LSC/2013/0673) held that only the notice dated 12th December 2013 complied with the requirements of clause 8 and in the circumstances the Second Respondent was not entitled to demand service charges from the Applicant before that date. That decision appears to have prompted the Applicant to issue these proceedings in July 2015, although it would appear that she has been in dispute about her service charges since 2010.

8. The position of Elizabeth Hurry is a central theme in the Applicant's objections to her service charges, in particular an alleged lack of authority to act on behalf of the First Respondent. The evidence presented to the tribunal was that Ms Hurry was appointed "administrator" to St Saviours Wharf Lessees Ltd, the managing agents to the First Respondent. That said, Ms Hurry and her trading entities were occasionally described as managing agents for the property prior to being appointed by the Second Respondent in that role. The Second Respondent accepts that this description is only accurate in relation to itself, not the First Respondent. The significance, if any, of that distinction is further considered below.

9. The tribunal was informed that the sole director of the First Respondent was one James Holloway, who took over from the previous director Rodney Williams in July 2015. The First Respondent had not complied with any of the tribunal's directions and no attendance was made by Mr Holloway on its behalf. He subsequently contacted the tribunal to apologise, confirming he had no knowledge of any previous problems when he took on the role and had only become aware of the dispute having discussed matter with the Applicant. At the hearing the Applicant confirmed that she had continued to take an interest in the First Respondent but didn't want to go on the board "until this mess is

sorted out". The purpose of the First Respondent continuing is not entirely clear to the tribunal since it no longer has a role in the management of the property but that is a matter for the members.

The issues

10. Unfortunately the preparation by the Applicant has been less than ideal. In particular, she failed to provide any detail in the schedule of disputed service charges or provide a single statement clearly setting out her arguments, despite directions to that effect. Instead, she provided an extensive hearing bundle with 30 sections, running to over 1500 pages. As the Second Respondent pointed out, this severely hampered the preparation of their defence, although the tribunal was greatly assisted by their well-presented and concise statement which provided some much needed clarity. Ms Hurry had provided copies of the various demands issued throughout the period in dispute and an attempt was made to complete the schedule of disputed service charge items from 2009-2015, although following the previous decision the tribunal accepted that the Second Respondent had no responsibility for management prior to 12 December 2013.

11. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) The payability and/or reasonableness of service charges for 2009-15, in particular in relation to any major works carried out during this period;

    (ii) Various issues relating to the governance of the leaseholder management companies;

    (iii) The treatment of the Applicant's contribution to the reserve fund.

12. Having heard evidence and submissions from the parties and considered the documents mentioned below, the tribunal has made determinations on the various issues as follows.

Service charges 2009-15

13. Under the Applicant's lease, the service charge year runs from 1 January to 31 December. Flat 27 is liable for a 1.269% contribution to general maintenance costs and a further 1.685% contribution to other expenditure, described in the lease as Type A and B expenditure. In addition, the Applicant has a separate lease for her car parking space. The contribution towards service charges under this lease appears to be accepted by all parties as 3.572%.

14. Clause 5 of the lease contains the Applicant's covenant to pay her percentage of the reasonable costs and expenses incurred in the management of the building, including a contribution to future expenditure. The contribution is due in two equal half-yearly payments in advance on 1 January and July of each year. There is provision for a balancing charge in the event of any shortfall or for any surplus to be carried forward for future expenditure.

15. Following the earlier tribunal decision, the Second Respondent only seeks to recover service charges from the Applicant from 12 December 2013. The monies previously sought from the Applicant of almost £8,000 were written off and the Applicant confirmed there was nothing outstanding from those years for the tribunal to consider (other than the balancing charge for 2013 set out below). That leaves service charges from 2009-2011, a matter between the Applicant and the First Respondent and service charges from 2014-15 for the Second Respondent. Disputed items for those years are therefore considered under separate headings below.

2009-2011: First Respondent

16. Given the fact that the managing agents (St Saviours Wharf Lessees Ltd) for this period no longer exist and the dormant status of the First Respondent, it is unclear to the tribunal what benefit the Applicant would obtain if she was successful in challenging any of the service charges over this period. In particular, it would appear that the First Respondent has no assets of its own and membership is limited to the Applicant and whoever else remains on their original tri-partite lease.

17. The Applicant's main challenge to her liability for this period focussed on the major works to the building carried out in 2010. The works were extensive, including works to the roof, the renewal of windows and doors and cost in the region of £734,000. The Applicant made no objection to the works themselves or the appointed contractors. Her challenge was based on an alleged defect with the consultation notices, in particular that they had been signed by Elizabeth Hurry as "The Management" holding herself out as the "duly authorised agent" of the landlord which in turn was incorrectly described as Manhattan Loft Corporation Ltd. Her primary argument was that the First Respondent should have served the notice but she also argued that the correct title for the freeholder was Manhattan Loft Corporation N.V. (being a Dutch company) and produced company documents to that effect.

18. If the Applicant is correct that the notices are defective, section 20 of the Landlord and Tenant Act 1985 would operate to limit the contribution of any tenant in relation to the relevant works to £250, subject to the ability of the tribunal to give dispensation to all or any of the requirements pursuant to section 20ZA of the 1985 Act. Since *Daejan Investments Ltd v Benson* [2013] UKSC 14 it has been clear

that the sole question for the tribunal when considering whether to give dispensation is the real prejudice to the tenants flowing from the breach. It is similarly clear that in this case there is absolutely no such prejudice claimed by the Applicant. In the circumstances if an application had been made for dispensation it would have been granted without hesitation.

19. The detailed requirements for the section 20 notices are set out in the Service Charges (Consultation etc)(England) Regulations 2003 (as amended). The relevant part for this application is Schedule 4 Part 2. That part requires the landlord to give notice to the tenant. Under the 1985 Act the definition of "landlord" includes any person who has a right to enforce payment of a service charge (section 30). The tribunal considers that this means that either the freeholder or the First Respondent could have been named as landlord in the notice. So does the fact that the notice was signed by Ms Hurry as agent and made a minor error in the landlord's title matter? No authority was cited to the tribunal and in view of all the circumstances of this case it is our determination that it does not. Ms Hurry was appointed as administrator/agent to St Saviours Wharf Lessees Ltd who were the undisputed managing agents for the First Respondent for many years. There is also no doubt that the freeholder is the Manhattan Loft Corporation. The purpose of the notice is to set out the works and give the tenant the opportunity to make representations. The Applicant does not claim she was unable to do so. The tribunal determines that the notices were valid and therefore the Applicant's challenge to the consultation process fails.

20. In addition to the consultation based challenge, the Applicant queried the ability of the Respondents to include the licence fee paid to the Port of London Authority for the dock and balconies in her share of expenditure, as her flat did not have a balcony. On consideration of the lease it was clear that no such distinction had been made. Under clause 5.01 the Applicant has covenanted to pay the relevant proportion of expenditure under clause 7.01 which includes the rates charged or imposed on the Building. The licence fee, although calculated by reference to the number of balconies, is charged to the Building as a whole. Again, this challenge fails.

2014: Second Respondent

21. The Applicant raised three challenges in relation to the service charges claimed for 2014. The first related to the balancing charge of £366.11 for 2013, demanded on the 31 December 2013. The Applicant objected to her liability for this amount in reliance on the previous tribunal decision. However, as stated in paragraph 7 above, that decision stated that the Second Respondent was not entitled to demand service charges before 12 December 2013, this demand is after that date. In the absence of any objection of substance and taking into account the

evidence provided in relation to the schedule of service charge items in dispute, the tribunal determines that £366.11 is payable by the Applicant in relation to the shortfall for 2013.

22. The demands for the service charges and reserve fund contributions for 2014 came to a total of £5,088.60. The Applicant's second challenge again relied on an alleged technical failure with the consultation notices in relation to works to the lobby. The Applicant claimed that because they pre-dated the notice of 12 December 2013, reference to the Second Respondent was incorrect.

23. For the reasons set out above, "landlord" under the relevant regulations includes both the actual landlord and the party who has a right to enforce payment of a service charge. As stated in paragraph 6 above, the Second Respondent satisfied the definition of "lessor" (or landlord) on the basis of their intermediate lease. In the circumstances, the section 20 notices served by Currell Management on behalf of the Second Respondent were served by the landlord on the tenant and there is no breach of the consultation requirements. There is of course no issue here with Ms Hurry, the Applicant accepts that she is the managing agent for the Second Respondent.

24. Even if the tribunal is wrong in its conclusion on this notice, the Applicant again made no attempt to claim prejudice and the Second Respondent applied for dispensation which the tribunal grants without hesitation. Again, this challenge fails.

25. The final challenge for 2014 was in relation to the charges for the car park, amounting to £405.66. The Applicant's objection was to 100% of the ventilation costs being charged to the car park. The Second Respondent agreed that a more appropriate proportion should be 50%, which resulted in a £21 reduction in the monies due from the Applicant.

26. The Second Respondent had completed the Schedule of Disputed Service Charges in relation to all the service charge items for 2014 and no specific objections were made by the Applicant other than as stated above. In the circumstances and in reliance on the demands in the hearing bundle the tribunal determines that for 2014 £5,088.60 is due from the Applicant for the flat and £384.66 for the car park.

2015: Second Respondent

27. The demands for 2015 amount to £2,344.62 for the service charge plus £3,857.20 for the reserve fund. The sole objection made by the Applicant to these charges was in respect of the reserve fund, on the basis that the work should be spread out over a greater number of years.

28. The Second Respondent pointed to a table of planned expenditure in the Applicant's bundle. This showed how the works were planned over future years. The reserve fund contribution sought in 2015 was to cover works to the internal lobbies (above the main lobby area) which had been estimated at a total of £210,000. Mr Chapman gave evidence that the last time these areas had been decorated was in or around 2002. The Applicant did not object to that evidence.

29. The relevant clause in the lease is 5.01 which contains a covenant by the lessee to pay "*...such monies as the Company shall at its sole discretion deem appropriate to build up a reasonable reserve to meet the maintenance expenditure of subsequent years...*". This clearly gives a very wide discretion to the Second Respondent (who has replaced "the Company") and in the view of the tribunal the amounts claimed are reasonable bearing in mind the planned works.

30. The Applicant made no other objection to the service charges, which were justified by the Second Respondent in their response to the schedule of disputed service charge items. Although no accounts are available for 2015, the tribunal considers that the estimated costs are reasonable in view of past expenditure and in the circumstances the tribunal determines that £6,201.82 is due from the Applicant in relation to the estimated service charges for the flat for 2015.

31. In addition to the flat, £536.14 had been claimed in relation to the car park. The Second Respondent confirmed it would reduce the service charge by £21 to reflect the concession in respect of apportionment of the ventilation costs, which was accepted by the Applicant. The remaining challenge was again to the reserve fund contribution of £125 on the basis that there was already a healthy reserve fund of £23, 452 and only £12,000 planned in terms of works.

32. The car park lease has identical service charge provisions at clause 5.01 in relation to reserve fund contributions. In particular it is clear that the reserve fund is intended to cover expenditure for more than one year. Given the wide discretion under the lease and the actual amount claimed from the Applicant the tribunal considers that the amount is reasonable and determines that the estimated charge is due, less the concession of £21, making the total payable by the Applicant for this item £515.14.

Governance issues

33. The clearest statement of the Applicant's position in respect of this issue is in her original application, where she states "*I have been asking since 2010 what is the process is with two management companies and have no clear output on the governance in this regards from the directors or the managing agent. Please provide some clarity on the*

governance in the case where there are two management companies and one head lease company."

34. As stated above and in the previous decision between the Second Respondent and the Applicant, management obligations have been passed to the Second Respondent. In the view of this tribunal, this means that the First Respondent has no current role. Since December 2013 the Second Respondent is the company entitled to undertake "the Company's" obligations under the Applicant's lease. Any matters prior to that date are for the First Respondent, although in reality it is and has been dormant for many years.

The Applicant's contribution to the reserve fund

35. The Applicant devotes much of her argument and documentation to this issue, mainly in relation to historic complaints about the use and treatment of reserve fund monies prior to the Second Respondent's responsibility for management. That is a matter for the First Respondent, with the limitations that have already been spelt out in this decision.

36. The Applicant's obligation to pay monies towards the reserve fund is set out in clause 5.01 of her lease as set out in paragraph 29 above. As stated previously, that clause gives a very wide discretion to the Second Respondent, subject to any oversight by this tribunal. We have determined that the amount sought for 2014-2015 is reasonable. The Applicant has also confirmed that appropriate banking arrangements are in place in terms of holding the monies to the account of the leaseholders. In the circumstances there is nothing further for the tribunal to determine in respect of this issue and the Second Respondent.

Application under s.20C and refund of fees

37. At the end of the hearing, the Applicant made applications under section 20C of the 1985 Act and for a refund of the fees that she had paid in respect of the application/ hearing[1]. The basis for the applications was that she believed that there were issues with the service charge and that she had no option but to issue proceedings. Having heard the submissions from the parties and taking into account the determinations above, the tribunal refuses the applications. The Applicant has succeeded in obtaining a very small reduction in her service charge liability, compared to the large amount outstanding. The costs incurred were to a large extent due to the Applicant's own failure to set out her case with any clarity and comply with the directions. In the circumstances it is clearly appropriate that the Second Respondent

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

has an opportunity to recover their costs, subject to the provisions of the lease in that regard.

Name: Ruth Wayte **Date:** 15 January 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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.