9605

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00ML/LIS/2013/0070**
Property	:	**Flat 4, 20 Devonshire Place. Brighton BN2 1QA**
Applicants	:	**Ian and Sarah Farringdon**
Representative	:	**Mr S Simmonds of The Property Shop**
Respondents	:	**Mark and Anne Packwood**
Representative	:	**Mr Packwood**
Type of Application	:	**Application for determination of service charges under s 27A Landlord and Tenant Act 1985 ("the Act") – transferred from the County Court**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr R Wilkey FRICS (Valuer Member)** **Mrs J Morrison (Lay Member)**
Date and venue of Hearing	:	**Holiday Inn, Brighton on 22 October 2013**
Date of Decision	:	**28 October 2013**

DECISION

The Applications

1. On 21 August 2012 the Applicant lessor's managing agents commenced proceedings in the county court for the recovery of ground rent and service charges from the Respondent lessees, who disputed the claim. On 7 May 2013, after the Applicants had been joined into the proceedings as Claimants, the court ordered that the claim be transferred to the Tribunal for determination. The Tribunal has jurisdiction to deal with the disputed service charges, which relate to the years 2008-09 to 2012-13 inclusive. It does not have jurisdiction to deal with disputes over ground rent.

2. At the hearing the Respondents made an application under section 20C of the Act that the Applicants' costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. There are presently no service charges due from the Respondents. However, if the on account demands which were the subject of these proceedings are re-issued in compliance with section 47 of the Landlord and Tenant Act 1987 and with section 21B of the Act, the following sums will become immediately due and payable, the Tribunal having determined that the amounts demanded are reasonable, as required by section 19(2) of the Act.

Year	£
2008-9	526.44
2009-10	600.00
2010-11	600.00
2011-12	600.00
2012-13	600.00

4. An order is made under s 20C of the Act.

The Lease

5. The Tribunal had before it a copy of both an original lease for Flat 4 dated 7 October 1983 and a new lease. The new lease was undated and unsigned but Land Registry entries record its date as 13 January 2012, and the Tribunal has proceeded on the assumption that the final version is in the same form as the copy provided. The original lease was for a term of 99 years with ground rent of £20.00 p.a. until 2008 and rising thereafter. The new lease term runs until 24 March 2172 and is at a peppercorn rent.

6. The original lease contained provisions with respect to service charges and these provisions are all incorporated unmodified into the new lease. The relevant provisions may be summarised as follows:

(a) The lessee covenants to contribute 20% of the lessor's expenses in complying with its covenants in clause 6(B) and (D). On account payments in a sum determined by the lessor or its agents are payable by the lessee on 25 March and 29 September in each year (cl. 4(B)(i) and (ii)).

(b) As soon as practicable after 25 March in every year, the lessor is to deliver to the lessee "a fair summary in writing certified by a qualified accountant" of the costs expended in the year to 25 March, along with notices confirming the actual amount of the lessee's liability and any amount due after crediting on account payments (cl. 6(D)(vi)(b)(1) – (111)).

(c) On receipt of the certified summary etc. the lessee is to pay any balance due. If the final liability is less than the sums paid on account, the excess must either be refunded to the lessee or credited to the following year or retained as part of the reserve fund (cl. 4 (B)(ii) and (iii)).

(d) Clause 6(D)(vi)(c)(1) provides for a reserve fund towards meeting future expenditure.

Procedural Background, Representation and Evidence at the Hearing

7. The Tribunal issued Directions dated 4 July 2013 which allowed both sides to submit further statements of case and supporting documentation. The Applicants' representative provided a letter dated 28 August 2013 along with accompanying documents. Mr Packwood provided a letter dated 16 September 2013, also with documents.

8. The Applicants did not attend the hearing, but were represented by Mr Simmonds of The Property Shop, the managing agents. Mr Packwood attended on behalf of both himself and his wife. There were no other witnesses.

9. The Tribunal did not inspect the Property, but was told that Flat 4 is the top flat in a converted Victorian terraced house, comprising 4 flats over 5 storeys (including the basement).

The Law and Jurisdiction

10. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable. Section 27A(3) specifically provides that application may be made to the tribunal to decide whether a service charge would be payable for costs that have not yet been incurred.

11. By section 19 of the Act a service charge payable before the relevant costs are incurred must be for a reasonable amount.

12. Under section 21B of the Act a demand for payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The wording of the summary is prescribed. A tenant may withhold payment of a service charge if the summary is not provided.

13. Section 47 of the Landlord and Tenant Act 1947 requires that any written demand given to a tenant of a dwelling contains the name and address of the landlord, and if that address is not within England and Wales, provides an address within England and Wales where notices may be served. If a service charge demand does not contain this information the sum demanded "shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant".

14. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

The Applicants' Case

15. Mr Simmonds relied on written demands dated 18 March 2008, 18 March 2009, 13 May 2010, 28 April 2011 and 8 May 2012 respectively. Each was a request for an account payment for the service charge year commencing 25 March in the calendar year when it was made. The first two demands pre-dated the start of the service charge year; the last three were made shortly after the start of the service charge year. All the demands save for the first were in the sum of £600.00 and covered the whole year. The first demand was for an apportioned amount running from the date when the Respondents acquired the lease (their predecessor having paid the charges up to that date). Mr Simmonds said that the amount of the on account annual payments had been

agreed with the lessees when The Property Shop took over the management in 2005, and had remained at the same level ever since.

16. There were no demands for additional payments based on year end accounts. Mr Simmonds explained this was because in every year to date the total of the on account demands had been sufficient, supplemented where necessary with surpluses held from previous years, to cover ongoing expenditure. The other lessees paid the £600.00 by monthly instalments, and since July 2012 the Respondents had done likewise. However between May 2008 and July 2012 the Respondents had paid nothing. The practical effect of this was that although ongoing expenditure had so far been covered by the other lessees' contributions, there was insufficient in the sinking fund to pay for exterior decoration work that was required.

17. Although not produced by him to the Tribunal, Mr Simmonds said that year end accounts were prepared and sent to all lessees. He accepted that they were not certified by an accountant as required by the lease. He said this would only add costs and until now no lessees had queried this. 20 Devonshire Place was a small property.

18. The demands each included the landlord's name (originally stated as Ms E Jakes, and later as Mr and Mrs Farringdon). The address given for the landlord was "c/o The Property Shop". Mr Simmonds contended that this complied with section 47 of the Landlord and Tenant Act 1987. The Applicants have very little to do with the building and that is why they employ managing agents to take care of things.

19. Mr Simmonds said that all demands sent out by The Property Shop were accompanied by a section 21B Summary. His firm sends out demands to 500 lessees a year and a Summary is always sent. No-one else has complained about absence of a Summary. He "organises the statements". There are six people working in the office.

20. He submitted it did not make any practical difference that demands were sent out annually rather than biannually given that all the lessees paid by monthly instalments over the entire year.

The Respondents' Case

21. Mr Packwood contended that the demands were invalid as they did not contain the landlord's actual address. A "care of" address did not satisfy the requirements of section 47.

22. He also said that the Respondents "categorically did not receive" a section 21B Summary with any demand. He was aware of what is required, he had all the paperwork for the flat, and there were no such Summaries. The sums demanded were therefore not payable.

23. Although he now accepted that the lease provided for on account payments, a further objection was that the on account demands had been made on an annual basis rather than 6-monthly as required by the lease.

24. Mr Packwood noted that the year-end accounts he had received had not been certified by an accountant as required by the lease. The on account demands needed to be considered alongside the previous year's certified accounts in order to consider whether the right amount was being demanded on account. This was another reason why the on account demands were invalid. However Mr Packwood also conceded he could not say that £600.00 p.a. was an unreasonable amount for the on account demands.

25. Mr Packwood referred to an email he had sent to the managing agents in June 2013, asking to see copy invoices supporting the service charge expenditure, and said he had received no response.

26. Mr Packwood also queried whether the Respondents could be liable for service charge arrears arising before the date of (a) the new lease and/or (b) the transfer of the leasehold title by the Respondents into joint names with their daughter in about May 2012.

27. Further points were raised in connection with the cost and scope of cover of the buildings insurance, but the Tribunal explained that these matters were beyond the scope of these proceedings.

Discussion and Determination

Compliance with Section 47 Landlord and Tenant Act 1987

28. The Upper Tribunal has confirmed in *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC) that the requirement for a landlord to provide his name and address is not satisfied where a landlord provides the address of his agent, instead of his own address. The purpose of s 47(1) is to enable a tenant to know who his landlord is. A name alone might not be sufficient; giving an address at which the landlord could be found assists in the process of identification. The address of the landlord for the purpose of s 47(1) is the place where the landlord is to be found. In the case of an individual, it is his place of residence or the place from which he carries on business.

29. The demands issued by the managing agents in this case provided their own office address as the landlords' "care of" address. It was not suggested that the Applicants resided or carried on business at that address. It is clear that section 47 has not been complied with and accordingly the sums demanded are not payable until the demands are re-issued containing the Applicants' actual address. The Tribunal also considers that the full names of the Landlord should be stated.

30. The attention of the Applicants and the managing agents is also drawn to section 48 of the Landlord and Tenant Act 1947. This provision was not mentioned by the Respondents, but must also be complied with.

Compliance with Section 21B of the Act

31. There was a clear conflict of oral evidence before the Tribunal on this issue. Neither side produced any documentary evidence to corroborate its position. However, it is for the Applicants, who seek to recover service charges, to establish that the requisite statutory requirements for payability have been complied with. The Tribunal bears in mind that it is generally easier for a party to establish that something he had to do has been done, than for another person to establish it was not done.

32. On a balance of probabilities (the requisite standard of proof), the Tribunal is not satisfied that the demands were accompanied by a section 21B Summary when they were issued. Mr Simmonds did not say that he personally dealt with sending out the demands. There was no direct evidence from any individual who actually prepared and sent out the demands that the Summary was sent, or as to the normal procedure followed. Nor was there any indirect evidence, such as reference to the Summary in the demands themselves or in any other documents sent to the Respondents with the demands, that a Summary was sent. Mr Packwood, who received the demands, was clear that there were no Summaries. Accordingly the Tribunal determines that the sums demanded are not payable until re-issued with an accompanying section 21B Summary.

Compliance with the requirements of the lease

33. The fact that year end accounts have not been certified by an accountant as required by a lease will not affect the validity of on account demands unless there are "clear words" to that effect in the lease: see *Warrior Quay Management Ltd v Joachim & Others* (Lands Tribunal decision LRX/42/2006) and *Wrigley v Landchance Property Management Ltd* [2013] UKUT 0376 (LC) LRX/159/2011. There are no such clear words in the lease of Flat 4. The requirement for certified accounts is only mentioned with respect to the year-end accounts.

34. Whether the lack of compliant year end accounts affects the reasonableness of the amounts demanded on account is considered in paragraphs 36 -38 below.

35. Contrary to the requirements of the lease, on account demands have been issued on an annual basis, rather than with reference to the specified payment days of 25 March and 29 September. However this

has had no impact on the Respondents or other lessees. In *Wrigley* the Upper Tribunal stated that it was the substance that matters, and found that on account demands remained payable notwithstanding they had been demanded with reference to an inappropriate date. The Tribunal reaches the same conclusion in this case.

Reasonableness of sums demanded

36. The Respondents' bundle contained copies of a document entitled "Maintenance Report and Financial Statement" prepared by the managing agents for service charge years 2008-09 and 2009-10 which indicated that actual service charge expenditure was £1836.77 and £1739.00 in those two years. There were no accounts produced of any kind for the subsequent three years but Mr Simmonds told the Tribunal that actual expenditure in those years was £1960.00, £1770.00 and £2242.00 respectively. Mr Packwood did not dispute those figures. Nor did Mr Packwood dispute Mr Simmonds' statement that exterior decoration (a service charge item) is required.

37. The on account demand sum of £600.00 p.a. for the Respondents' 20% share is equivalent to an overall provision for expenditure of £3000.00 p.a. The expenditure for the last 5 years would not appear to cover any significant maintenance work by the lessor. Doing the best it can on the available evidence, the Tribunal concludes that £600.00 is a reasonable amount for each year in question, given that the lease provides for a reserve fund, and given that there is work required to the building.

38. A word of warning must be added. For future years it may not be possible to conclude that the amount demanded on account continues to be reasonable unless year-end accounts prepared in accordance with the lease have been produced, and which, together with a budget, provide some support for the amount demanded. Furthermore, the Tribunal is only making a determination as to the *on account* demands for the 5 years ending 24 March 2013. It remains open to the Respondents or any of the other lessees to make an application to the Tribunal under section 27A of the Act for a determination of the *final* service charge payable for any of those years. In the context of such an application, a failure to produce year-end accounts in compliance with the lease will be relevant, as explained in the *Warrior Quay* case.

Other matters

39. Neither the grant of the new lease to the Respondents, nor the transfer of the leasehold title to themselves and a third party, affects their liability for any arrears of service charges, because the Respondents have been lessees and bound by the covenants throughout. The Respondents' argument on this issue is therefore rejected.

40. Any failure by the Applicants or the managing agents to respond to Mr Packwood's email of June 2013 does not affect the outcome of this case. A tenant's right to further information about service charge costs is governed by sections 21 and 22 of the Act (note prospective amendments not yet in force). A tenant's rights with respect to insurance are set out in the Schedule to the Act.

Section 20C Application

41. Mr Packwood asked for an order under section 20C on the ground that if he was right in his arguments, it would be unfair for the lessees to have to pay the lessor's costs.

42. Mr Simmonds objected to an order on the basis that the costs had only been incurred due to the Respondents' failure to pay their service charges. The building and the other lessees had suffered as a result.

43. In deciding whether to make an order under section 20C a tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. In this case the Respondents have been successful in contending that the sums demanded are not yet payable. The reason they are not payable is the failure of the managing agents to comply with all appropriate statutory requirements. It would not be just or equitable for the lessees to have to pay for the consequences of this failure and accordingly the Tribunal orders that, to such extent as they may otherwise be recoverable, the Applicants' costs in connection with these 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 Respondents or any other lessees.

Concluding Remarks

44. The parties and the managing agents are referred to the Service Charge Residential Management Code 2nd edition published by the RICS, which provides very helpful guidance on the issues covered by this decision and other concerns raised by the parties.

45. The matter is now remitted back to the county court.

Dated: 28 October 2103

Judge E Morrison (Chairman)

Appeals

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.