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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/18UG/LSC/2013/0049
Property	:	5 Victoria Court, Victoria Street, Totnes, TQ95TR
Applicant	:	Mr A Dale
Representative	:	In Person
Respondent	:	Devon and Cornwall Housing Group
Representative	:	Mr S Lane of counsel
Type of Application:		Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges) Tenant's application for the determination of reasonableness of service charges.
Tribunal Members:		Judge A Cresswell (Chairman) Mr W H Gater FRICS ACIArb
Date & venue of Hearing:		16 October 2013 at Totnes
Date of Decision:		27 October 2013

DECISION

The Application

1. On 7 May 2013, Mr A Dale, the owner of the leasehold interest in Flat 5 Victoria Court, Victoria Street, Totnes, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs

claimed by the landlord, Devon and Cornwall Housing Group, for the year ended 31 March 2013.

Preliminary Issue

2. There was a preliminary issue as to the Tribunal's jurisdiction to hear this application.
3. The Tribunal has determined that preliminary issue after hearing all of the relevant evidence presented by and on behalf of the parties.

Inspection and Description of Property

4. The Tribunal inspected the external part of the property on 16 October 2013 at 1000. Present at that time were Mr Dale, Mr Lane, and Ms S Davies and Ms Z Walton, employees of the Respondent, who gave evidence at the hearing. The property in question consists of a modern 2-storey group of flats arranged around a common courtyard in a U-shape of 3 blocks. The property is in a central location in Totnes. The Tribunal noted multiple leaking gutters, poor external paintwork on boundary walls in particular, rot in the external woodwork to porches and a missing gulley cover. The Tribunal saw the external lighting and the location of the electricity meter.

Summary Decision

5. This case arises out of the tenant's application, made on 7 May 2013, for the determination of liability to pay service charges for the year 2012/13. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has jurisdiction under Section 18 of the 1985 Act in relation to a variable service charge, but not in relation to a fixed service charge. The Tribunal has determined that the Applicant's service charge is a fixed service charge, with the consequence that the Tribunal does not have jurisdiction to hear his application.

6. Mr Lane accepted that the lease does not provide for recovery of the Respondent's costs. The Tribunal, accordingly, allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the landlord from recovering its cost in relation to the application by way of service charge.

Directions

7. Directions were issued on 10 July 2013. These directions noted the requirement for the Tribunal first to determine the preliminary issue of jurisdiction.

8. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral submissions given at the hearing.

The Law

9. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

10. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

11. The relevant law is set out below:

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(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.

Home Group Limited v Mr A W Lewis and others LRX/176/2006, HH J Huskinson:

21. There is nothing in the tenancy agreements indicating that any altered rent is to be calculated in any particular manner, or linking an alteration in rent (including service charge) with an alteration in the costs of providing any relevant services. Accordingly, it seems to me that section 18(1)(b) is not satisfied. It is true that it can be said that the Appellant in deciding whether to serve a notice of increase and, if so, how much that increase should be may well inform itself (as indeed it accepts it does) by reference to the estimated costs of providing services in the forthcoming year. However the ability in someone to serve a notice increasing the rent, if it chooses to do so, and to calculate that proposed new rent taking into account increases in the costs of services does not enable it in my judgment to be said that the rent (including service charge) is a payment "the whole or part of which varies or may vary according to the relevant costs". The sum payable does not vary in accordance with the relevant costs. Nor in my judgment can it be said that it "may vary" in accordance with those costs. There is no direct relationship between the

amount of the costs as a cause and the amount of the service charge as a consequence. Interposed between the amount of the costs and the amount of the service charge is the independent decision of the landlord (here the Appellant) or of the Rent Assessment Committee as to how much the new rent/service charge should be. Of course it can be said that the Appellant and that Rent Assessment Committee may take into account the reasonably estimated amount of the service costs in the forthcoming year, but that in my judgment is at least one remove from a situation where a rent varies or may vary according to the relevant costs.

The Determination

12. The history of the matter insofar as it relates to the formalities of the lease is not in issue. The current Respondent represents an amalgamation of 3 social housing groups. The property was a part of the portfolio of Tor Homes, one of the 3 groups.

13. Following a consultation in December 2010, Tor Homes moved from a variable service charge regime to a fixed service charge regime with effect from 4 April 2011. The Applicant commenced his lease with the Respondent on 16 April 2012.

14. Unfortunately, the arrangements between the Respondent and the Applicant were beset by errors on the part of the Respondent. It is pertinent for the Tribunal to detail some of those errors.

15. The Tribunal was told that because some properties in the Respondent's group remained the subject of a fixed service charge regime, when an officer of the Respondent printed a lease form, schedules for both a fixed and a variable service charge would be printed. The officer should discard the irrelevant schedule and use only the relevant schedule. That did not happen in this case, because this Applicant was required by one of the Respondent's Allocations team to sign both schedules and the Respondent's representative also signed both schedules. This error was then not identified when the team member returned to the Respondent's offices with the signed lease or until the Applicant began to make his enquiries of the Respondent.

16. When the Applicant queried his service charge, which was due to increase from 1 April 2013, he received a response from a Leasehold Housing Assistant explaining that his charge had been adjusted because of an underpayment made on the communal electricity during the year 2011/2012. Not surprisingly, the Applicant wondered why he would have any responsibility for an underpayment in a year when he had not been a tenant. There then followed a sentence: "*I also understand that there is a deficit on your accounts which cannot be collected during the new financial year.*" The Tribunal was told that the Applicant should have understood that those words meant that the service charge for his tenancy was fixed rather than variable, notwithstanding what the author had just said about the collection of an earlier underpayment. The Tribunal was told that this was mistake by a new member of staff who had assumed that there was a variable service charge.

17. The Tribunal heard that:
    - a mistake had been made by one of the witnesses when inputting an electricity charge,

- another employee had made a further mistake when increasing the cost of electricity for the year 2013/2014 by 620% rather than the required 13%,
- the Applicant had been sent the wrong letter, setting out a list of charges with nil amounts,
- there were errors in the witness statement provided for the Hearing where that statement referred to a 15% rather than 10% administration charge and where the statement appeared to suggest that a budget document had been sent to the Applicant, when the Respondent's system would preclude the sending of such a document.

It appeared to the Tribunal that the litany of errors on the Respondent's part would not have come to light, but for the diligence and persistence of the Applicant.

18. Notwithstanding the errors which the Tribunal has detailed above, it was clear, eventually, that there was here a fixed rather than a variable service charge, and the Tribunal accepted the Respondent's arguments in that respect based as they were on Section 18 of the 1985 Act and **Home Group Limited v Lewis**.

19. The Tribunal accepted that the Respondent had moved away from a variable service charge regime in April 2011 and that it was operating a fixed service charge regime from April 2011. What actually happened in practice was that the Respondent in January of each year would gather known expenditure for the preceding 9 months and factor in likely increases in costs for the forthcoming 12 months running from April of that year and arrive at a fixed service charge. The service charge was not variable because it did not have a direct relationship to the lease year in question; rather it was a figure guided by the process which the Tribunal has detailed above. As Mr Lane submitted, the Respondent, as a social landlord, could be criticised if the fixed charge had no relationship at all to what might be the real costs.

20. The Applicant was concerned primarily that he should pay a proper share of costs attributable to his tenancy of his flat. Given the errors on the part of the Respondent, the Respondent has determined not to recover any monies attributable to the use of communal electricity at the property. The Tribunal imagines that the costs of that electricity will have to be passed on to others if the Respondent is to balance its books for the year in question, which is not a result sought by the Applicant.

21. The Applicant's main concern was not whether this was a fixed or variable service charge, but whether the Respondent was correctly charging for the services attributable to the Applicant's tenancy. Where the Respondent has fallen down in particular is its failure properly to communicate to the Applicant that his was a fixed service charge and how it went about assessing the quantum of that charge. Mistakes in the signing of the lease, in correspondence sent to the Applicant, in inputting, in the percentage applied for administration and a grossly inflated increase in cost (620% when it should have been 13%) can only have added to the Applicant's concerns. This application will serve as a lesson to the Respondent of the need for better systems of operation and management.

22. A fixed service charge can be challenged where it is part of a rent increase under the Tribunal's jurisdiction for rents, but such a challenge would require comparison of

the social rent with rents available on the open market, with the associated risk that the rent could be increased by the Tribunal.

Section 20c Application

23. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(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 ... ... leasehold valuation 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.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

24. Mr Lane accepted that the lease does not provide for recovery of the Respondent's costs. The Tribunal, accordingly, allows the application under Section 20c of the Landlord and Tenant Act 1985. It directs that the landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

A Cresswell (Judge)

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.