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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/OOMA/LSC/2013/0108**
Property	:	**10 Avon Court, Cressex Close, Binfield, Berkshire RG42 4DR**
Applicant	:	**Mr Anthony Harris**
Representative	:	**Mr S Gallagher, Counsel** **G H Canfields Solicitors**
Respondent	:	**Avon Court (Binfield) Residents Association Limited**
Representative	:	**Miss D Gilbert, Counsel** **P D C Legal Solicitors**
Type of Application	:	**Liability to pay service charges under the provisions of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs S Redmond BSc Econ MRICS** **Mr J E Francis**
Date and venue of Hearing	:	**Cantley House Hotel, Milton Road, Wokingham, Berkshire on 28th February 2014**
Date of Decision	:	**23rd April 2014**

DECISION

DECISION

The Tribunal determines that for the service charge years July 2009 to December 2012 (which represents the actual costs to December 2011) no claim is made by the Respondents and accordingly we find in the Applicant's favour and confirm that he has no liability for this period.

We find that the service charges for the period 2004 to July 2009 are not presently recoverable from the Applicant for the reasons set out below.

We order that Section 20C of the Landlord and Tenant Act 1985 shall apply, it being just and equitable in the circumstances for the reasons set out below.

We determine that there shall be no other orders for costs against either party for the reasons set out below.

The Tribunal records that Mr Harris withdrew his application in respect of the service charge years ending December 2013 and any on account payments for 2014. This was without prejudice to his rights to reinstigate an application in due course if it is felt appropriate.

BACKGROUND

1. By an application dated 21st August 2013 made on behalf of Mr Anthony Harris by his solicitors G H Canfield, Mr Harris sought to challenge the service charge years from 2004 to 2013. The application listed a number of items that were said to be in dispute but said as follows: *"The above list is not exhaustive due to the failure to provide service charge accounts for the years in dispute."* The application went on to say under the heading "Any further comments" as follows: *"The management company refused to engage with the tenant's objections and has now admitted inter alia that the tenant's objections were valid and the service charges levied for the disputed years were wrong and no payable by the tenant. The tenant seeks a declaration to this effect and recovery of sums wrongfully paid by the tenant."*

2. Annexed to the application was a letter from Avon Court (Binfield) Residents Association Limited to Mr Harris dated 17th October 2012. This letter is of relevance in considering the matter and certain extracts should be set out. They are as follows: *"Although we understand that the service charges have been collected in advance and based on budget rather than actual expenditure, we are advised that this is contrary to the lease. ... It may be that monies were collected in arrears but based on a round figure split equally between all flats – it would certainly appear from some of the older accounts that have been found there was never a building or estate account as required by the lease and all the figures are in round numbers suggesting that the charges were all the same which would be unusual if the charges had been levied as required by the lease."* The letter goes on to discuss the possibility of amending the leases but rules that out because of the costs and then recites what are considered to be the requirements of the lease namely *"to split the expenditure on the building separately so that there is a building account for Flats 1 -12 and a second building account for Flats 13 - 21. There is then an*

estate account which covers all the items that are shared equally. In addition to this there is a further requirement to charge any repairs to the forecourt of the garages according to the number of garages there. What this means in practice is that any repairs to the front of garages 1 – 6 would be charged solely to the Flats 1 – 6 and works to the remaining garage forecourts would be charged between Flats 7 – 21." The letter then goes on to set out the proposals as to how this matter be put into effect. It is with this background that the matter came before us for hearing on 28th February 2014.

3. Before the Hearing we were provided with extensive documents. They were made more extensive because there appears to have been, shall we put, at its best a misunderstanding between the legal teams as to the requirements for disclosure. We do not propose to go into the whys and wherefores as it does not take the matter any further. Suffice to say we are disappointed that the respective solicitors could not have handled the matter in a more appropriate manner so that the documentation could have been reduced to that which was relevant. The papers that are within the bundles, which are of importance, are the lease, the Applicant's statement of case which is dated 19th February 2014 accompanied by the Applicant's own statement which dated even closer to the hearing date namely 27th February. The Respondents produced their own bundle which contains their statement of case and the accounts and other documentation. In a third bundle we were provided with a number of invoices.

4. Prior to the Hearing Mr Gallagher lodged a skeleton argument which we will deal with in due course and after the hearing had closed we received lengthy written submissions from Miss Gilbert on behalf of the Respondents and short submissions in response by Mr Gallaher on behalf of the Applicant.

HEARING

5. The Hearing started with an application by Miss Gilbert to strike out the Applicant's case for failure to comply with the directions and in particular the late delivery of bundles and the Applicant's statement of case. She felt that she had been 'ambushed' and that the intention on the part of the Applicant was to arrange for a case management conference, something that had been requested by his solicitors a little while ago. In response Mr Gallagher said that he had only just received the Respondent's bundle but did not intend to take a point. There had apparently been "misunderstandings" between solicitors as to how documentation should be dealt with. Miss Gilbert went on to say that the Applicant's statement of case contained much that was irrelevant but does set out some items of service charge which are to be challenged. Her view was that the statement of case could and should have been dealt with in October and the late delivery of Mr Harris's witness statement and a witness statement from a Mr Kim Reynolds completely disregarded the Tribunal's rules and directions. This was, she repeated, litigation by ambush and was vexatious. The Respondent, she said, was severely prejudiced. They were proceeding blindly and had zero opportunity to go through the documents and zero opportunity to obtain evidence, much of which related to the actions of a previous managing agent.

6. Mr Gallagher expressed the view that solicitors appeared to have taken different views of the directions but that in actuality the application was based

on the lack of accounts and the Respondent's failure to comply with the terms of the lease. This point, as explored in his skeleton argument, comes as no surprise to the Respondents and in his view was unanswerable. He said it was common ground that proper accounts had not been produced and that the allegation of the absence of compliant accounts remains. His submission, therefore, was that there was no prejudice or trial by ambush. Miss Gilbert's application was nowhere near the strike out territory provided for in Rule 3 of the new rules and that we should proceed with the matter.

7. It was during this opening exchange that the Respondents accepted, for matters that we do not need to go into in this decision, that they would not be seeking to recover from Mr Harris the service charges represented in the demands from July 2009 to December 2012. The December 2012 demands related to the actual costs incurred to December 2011. With this concession leaving only the period 2004 to July 2009 to be considered, we invited the parties to adjourn to see if there was a possibility of reaching some form of compromise. Unfortunately, despite best efforts on both sides, it appears that it was not possible to reach such a compromise and the parties returned to make further submissions on the way forward.

8. It being agreed that there was no claim against Mr Harris for the period July 2009 to December 2012, a debate ensued as to how that period should be dealt with by the Tribunal. Mr Gallagher was of the view that it would be wrong for us to strike out that element of the claim but instead that we should make a finding that there was no liability to pay service charges for this period. Miss Gilbert's view was that in relation to the period 2009 to 2012, as there were no charges in existence there was nothing for us to determine and that accordingly we had no jurisdiction. She accepted, however, that the matter could be dealt with by Tribunal confirming there was nothing to pay and nothing was sought on the Respondent's concession that they had no claim and that it had been waived for this period.

9. Insofar as the earlier period from 2004 to July 2009 is concerned, we need to set out the submissions made both prior to, during and after the Hearing. We also need to consider the appropriate parts of the lease that apply to this particular matter. It is, we think, common ground that until the company accounts for the Respondents for the year ending December 2012 were prepared, there was no distribution between buildings, estate and garage. The accounts ended 31st December 2011 just show total expenditure in relation to various matters and make no apportionment between such expenses as may apply to Flats 1 – 12 or 13 – 21. As we indicated above, this position appears to have been accepted by the Respondents in their letter of 17th October 2012 attached to Mr Harris's application.

10. Mr Harris's lease is dated 10th December 1970 and demises Flat 10 and the garage No 10. The term is for 99 years from 24th Jun 1969 upon payment of a small but rising ground rent. Under paragraph 3 of the lease we find the provisions relating to accounts. We paraphrase those as follows. The service charge year ends 31st December and the accounts shall contain both a building account and an estate account. The building account relates to building maintenance costs expended during the year by reference to provisions at clause 5 and includes the insurance premium. The estate maintenance costs

again are on the basis of accounts actually expended during the year, again referring to various sub-clauses in clause 5 and including costs, charges and expenses of solicitors, accountants etc. At paragraph 3(d) it is recorded that the building account and estate account can include sums reasonably considered desirable for future costs and at paragraph 3(e) the following wording is to be found: *"The decision of the company, its agents or surveyors as to whether any item of expenditure shall be included in the building account or in the estate account shall be final and conclusive and binding upon the lessee."* The clause goes on to provide that on or before 24th June 1972 and on 24th June each succeeding year, the lessee will be provided with a copy of the building account and estate account for the period of 12 months ended on 31st December of the immediately preceding year. The clause goes on to provide that the lessee shall pay to the company, that is to say the Respondent, a yearly maintenance charge which shall be the aggregate of one 12th part of the total amount of the building account, one 21st part of the total amount of the estate account and one 15th part of the costs relating to the maintenance of the garage forecourt.

11. At clause 4(2) of the lease the lessee (Mr Harris) covenants to pay to the company the maintenance charges mentioned above by equal half yearly payments on 24th June and 25th December in every year.

12. Clause 5 of the lease sets out the Respondent's covenants in respect of repairs and maintenance and to pay to the freeholder the costs of the insurance.

13. Mr Gallagher in his skeleton argument says that no accounts have been prepared or supplied to the Applicant that conformed to these terms. This is confirmed, he says, by the Respondent's letter referred to above dated 17th October 2012. That, he says, is sufficient to render all sums demanded by the Respondents ineffective. He says that the absence of any building and estate accounts means there is no contractual liability to pay the yearly maintenance charge. He does accept, however, that time may not be of the essence in performance of this obligation but that the obligation has not in any event been performed. The submission went on to confirm that no reliance was placed by Mr Harris on the provisions of Section 47 of the Landlord and Tenant Act 1987 and that whether Section 21B of the Landlord and Tenant Act 1985 applied was a matter upon which there might need to be further submissions. He also went on to assert that the failure by the Respondents or its managing agents to levy service charges properly would obviously render the various professional charges made by the Respondents unreasonable.

14. At the Hearing Mr Gallagher, in respect of this period, accepted that the costs to prepare accounts that complied with the lease, which we were told could be quite extensive, may be disproportionate and it was not something that Mr Harris was asking for. He accepted we did not have power to order the Respondents to carry out these works. However, his position was quite simply that because there were no proper accounts and accordingly no proper demands arising from those accounts, there can be no sums properly demanded for the period 2004 to 2009. It is a matter for the Respondents to decide whether they seek to put this right. It was, he said, wrong for us to consider striking out this element of the claim on the question of proportionality and referred us to Rules 3 and 9 of the new rules and that we

should make a declaration that the sums were not properly due and owing at this moment in time.

15. Miss Gilbert indicated that she believed we had jurisdiction to assess and determine whether the sums were payable and reasonable. The savings that Mr Harris might make were minimal. In any event, after further submissions were concluded that the appropriate way forward was to give both Counsel the opportunity to submit further submissions in respect of the accounts. Miss Gilbert was given seven days to file submissions in response to Mr Gallagher's skeleton and Mr Gallagher was given time to file a response. At the conclusion of the submissions we were told that the Applicant, Mr Harris, agreed to withdraw his applications for the years ending 2013 and 2014 but without prejudice to his right to revisit them when correct accounts were prepared.

16. Miss Gilbert's submission running to some nine pages is dated 7th March and raises a point not argued before us. This is whether we had jurisdiction to deal with the charges for the years 2005/06 on the basis that payments had been made by Mr Harris, it appears as a result of court proceedings, in the sum of £1,900. Although no court documentation was produced to support any of these assertions and it was not known whether the proceedings were withdrawn or had been compromised by way of settlement or consent order, she nonetheless was of the view that an estoppel had been created. In settling the claim for these years Mr Harris brought the matter within the provisions of Section 27A(4) of the 1985 Act and could not, therefore, proceed to challenge these two years. In respect of the years 2004, 2007 and 2008, again a submission was made that Mr Harris had either admitted or agreed to those. Whilst accepting the Act does not rule out a tenant from challenging merely because payment has been made, she submitted that it is a "relevant factor to be weighed in the balance." She said that we should take into account the length of time that has passed since the challenge has made, whether payment was made with any challenge or reservation, whether there were repeated payments made without challenge or reservation and whether in other proceedings the challenge could have been made but was not. She then went on to deal with each of those matters in further detail. In the circumstances, she said, we were invited to conclude that there was no jurisdiction to determine any of the sums in dispute. If we were against her on this she proceeded to respond to Mr Gallagher's skeleton argument.

17. We do not think it is necessary to go into great detail. We have noted carefully all that she says and have borne that in mind when making our decision. We note also her secondary submissions which run from paragraph 26 onwards. In her conclusion we are invited to find that Mr Harris has admitted the sums for 2005/06, that he has also effectively admitted sums outstanding in 2004, 2007 and 2008 by his conduct. In addition, we are invited to find there was discretion for the Respondent to allocate all expenditure to the estate account, which is what has been done, and that the sums were in fact demanded in accordance with the lease and are payable only subject to the question of reasonableness. Alternatively, the failure to prepare accounts and demands does not render the demands invalid nor extinguish Mr Harris's liability to pay. The issue is one of reasonableness which could be determined at a full hearing. Attached to the submissions were the case reports of *Zurich Insurance Company PLC vs Colin Richard Hayward [2011]EWCA Civ 641*, the case of

Drinkall vs Whitward [2003]EWCA Civ 1547, Shersby vs Grenehurst Park Residents [2009]UKUT 241(LC).

18. In response to these submissions by Miss Gilbert, Mr Gallagher said that the jurisdictional issue could not be determined in the Respondent's favour without certain findings. The burden of proof rested with the Respondent and in the absence of any documentation or evidence to support the possible existence of some form of agreement arising from the Court proceedings or estoppel or in support of the "more than mere payment argument" we could not find in the Respondent's favour. We were reminded that Counsel cannot give evidence and that Miss Gilbert's closing submissions should not be accepted on that basis. If evidence were to be produced another hearing would be required which he respectfully submitted would be disproportionate and contrary to the Tribunal's overriding objective. He did not accept that the Respondents had been taken by surprise by the late service of the Applicant's statement. The application issued in August 2013 makes it quite clear that there were issues relating to the accounts and indeed the letter from the Respondents in August 2012 appears to admit there was the problem which is argued for by the Applicants. Furthermore, the Respondents were fully aware of the payments made by the Applicant and if they wanted to have taken the jurisdictional point had ample opportunity to do so.

19. Mr Gallagher's submission then went on to raise issues as to such evidence that would be produced by the Applicant if the matter was referred back and then readdressed the primary issue in his original skeleton argument. He referred to the Shersby case and also made reference to the case of *Bhojwani vs 12-18 Hill Street Investments [2013]UKUT 0361 (LC).* He went on to say that the service charge recoupment in accordance with the Avon lease had not been complied with and that as a result none of the disputed service charges were presently due and payable by the Applicant.

THE LAW

20. The law applicable to this matter is set out on the appendix attached. In reaching our determination we have also considered the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 and in particular the overriding objective contained at Rule 3, the strike out powers contained at Rule 9 and the provision for the order of costs contained at Rule 13.

FINDINGS

21. We will deal firstly with the findings in respect of the service charge years from July 2009 to December 2012. We accept that in the service charge year ending December 2012 this records the actual expenditure for the year ending December 2011. The Respondents have indicated that they do not intend to proceed to claim these sums from Mr Harris. It was not wholly clear why they have taken this view but we expect it may be because there have been some problems with Mr Harris obtaining benefits following a serious road traffic accident and perhaps other issues that do not need to burden us. Suffice to say, we record that the Respondents agreed to discontinue any claim against Mr Harris for these sums in this period and accordingly think it is appropriate to make an order recording the Respondents' agreement to waive the claim

against Mr Harris and to find in effect in his favour that for the years July 2009 to December 2012 he owes no money in respect of service charges.

22. Matters are slightly more problematic in respect of the earlier years. We heard all that was said on behalf of the Respondents and ably argued for by Miss Gilbert in her submission. We will deal firstly with her submission that we have no jurisdiction because of the actions of the Applicant. We cannot accept these submissions. It seems to us wholly wrong to suggest that the Respondents have somehow been ambushed by Mr Harris's arguments regarding the terms of the lease. It is of course accepted that mere payment of a service charge does not prevent the tenant from challenging same. The Applicant's statement of case under the heading "Relevant background" at paragraphs 11 onwards, sets out the numerous payments made by Mr Harris in the period to July 2009. Substantial sums have been paid and it is not possible to discern whether by July 2009 Mr Harris was in fact in arrears with his service charges even if the accounts had been prepared in accordance with the lease. That is something that the Respondents should bear in mind. However, if the Respondents were going to argue that there was some form of jurisdictional point to be taken on the application in respect of payment by Mr Harris constituting some form of binding agreement or estoppel, they should have done so before the written submissions put forward by Miss Gilbert. No evidence whatsoever was produced at the Hearing to suggest that there had been any form of compromise or that there was an issue of estoppel and these seem to have arisen from Miss Gilbert's review of documents following the Hearing. Our view is that the Respondents should have raised such issues before then. They had ample time to have produced any form of consent order to show that the payment of £1,900 had been made on that basis and it is difficult to know what estoppel they could seek to rely on. In those circumstances we cannot see that the jurisdictional point argued for by Miss Gilbert in the first part of her submissions has any weight. Section 27A(4) does not apply. The fact that Mr Harris may have made payments does not preclude him from subsequently challenging. He made it quite clear in his application in August 2013 and by attaching the letter of 17th October 2012 that he had issues with regard to the accounting process and the Respondent therefore had ample time to have raised this jurisdictional point and produced evidence in support.

23. We turn then to the submissions relating to the provisions of the lease and say at the outset that we find in favour of Mr Gallagher and the submissions that he put to us before the hearing. It is quite clear that until the service charge year ending December 2012 the Respondents had not broken down the service charge sums between the two buildings, the estate and the garages. It seems to us to be somewhat trite to suggest that in producing one account and requiring each lessee to pay one 21st the Respondents have done all that they were required to do by reference to the terms of the lease relying upon the discretion for them to place expenditure in particular heading. This cannot be right. One only has to look at the 2012 accounts where there has been an attempt to apportion costs between the relevant buildings to see that in respect of the building account for 1 – 12 the expenditure was £3,111 and for the building account for 13 – 21 only £916. If the old system of accounts had applied those figures would have been added together and each lessee would have paid one 21st. That would have been unfair in this instance on the residents of the

building containing Flats 13 – 21. It is clearly essential that for any accounts to be produced upon which a demand is founded, those accounts must comply with the terms of the lease. The lease is quite clear. It requires the accounts to be divided between the buildings, the estate and the garages. The Respondent has failed to do that and indeed by their letter of 17th October 2012 accept that that is the case. We do not, therefore, understand why this issue had to come before us. The arguments put forward by Miss Gilbert cannot be accepted by us. Accordingly in respect of her primary submission we find that the service charges have not been determined in accordance with the lease and accordingly any demands relying on those erroneous accounts must be irrecoverable at this present time. Her secondary submission is also dismissed by us. Whilst we accept that the lease provides for the Respondents to determine into which building account or estate account the costs shall be included (see clause 3(e) of the lease), they clearly have not considered a building account at all. They appear to have operated the accounts solely on the basis of estate maintenance costs and as we have highlighted above, that is clearly inappropriate when one contrasts the position with the 2012 accounts where they have actually attempted to divide the costs between different buildings. The maintenance charge is made up of one 12th part of the building account in the case of Mr Harris, a one 21st part of the estate account and a one 15th part of the works in respect of the garage forecourt. To lump all these items of expenditure into one estate account is clearly, in our finding, wrong and until such time as accounts for this period have been prepared in accordance with the lease, we find that they remain technically irrecoverable from the Applicant.

24. We think, however, we ought to express a view, and it is nothing more than that, as to how this matter should be dealt with. Mr Harris appears from his statement of case to have paid most, if not all, of the service charges up to the demand made for payment in July 2009. The sums involved, therefore, in preparing any form of account and issuing fresh demands for Mr Harris to pay, are probably disproportionate to any underpayment by Mr Harris, if any. Equally, we would ask Mr Harris to think very hard about whether or not he seeks to make an application for repayment of any of the monies that he has expended. There is an issue as to limitation on the question of restitution and in any event, if the accounts are re issued in the correct format he might have a liability over and above that which he has already paid. We would, therefore, suggest to both parties that they consider whether (a) it is worth the time and expense of preparing fresh accounts for the period 2004 to 2009 and (b) whether Mr Harris wants to require those accounts to be done and/or to undertake any form of restitution proceedings. There is no doubt that services were provided during this period. It seems to us that there is much to commend both parties putting this behind them and moving on to make sure that the accounts are dealt with correctly in the future and to avoid any further unnecessary costs.

25. Insofar as costs, we find that it would be inappropriate for the Respondents to seek to recover same under the reasonableness provisions of the new rules and are somewhat surprised that their solicitor should have gone to the time and expense of preparing a statement of costs as they did.

26. Insofar as Mr Harris's costs are concerned, that is slightly more problematic. However, there is no doubt that Mr Harris was late in complying with the various provisions of the directions and to produce a witness statement but a few days before the case is due to be heard and a statement of case no more than a week or so before the case is to be heard, is inappropriate. He is not, therefore, blameless. With a view to endeavouring to draw a line under the matters, we conclude that no orders for costs should be made in favour of Mr Harris. We also order that the Respondents are not allowed to recover their costs as a service charge by virtue of Section 20C of the Act, it being just and equitable so to do.

Judge: ______________________
Andrew Dutton

Date: 23rd April 2014

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.