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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AF/LSC/2015/0325**
Property	:	**Flat 1, The Chestnuts, St Paul's Cray, Kent, BR7 6QD**
Applicant	:	**Mr Gerald Chesneau**
Representative	:	**Ms Linda Reynolds, Leasehold Services Limited**
Respondent	:	**Chestnuts Property Management (Chislehurst) Ltd**
Representative	:	**Mr Deryck Prangell**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal member	:	**Judge Robert Latham**
Date and Venue of Hearing	:	**4 November 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**18 December 2015**

DECISION

Decision of the Tribunal

(1) The Tribunal determines that the sum of £4,059.69 is both payable and reasonable.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) The Tribunal does not make any order against the Respondent under either Rule 13(1) or 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. By an Application dated 21 July 2015, the Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by him. He states that he is seeking a determination in respect of the Service Charge Year 2013/4. In reality, he is challenging one service charge demand, dated 24 June 2013, in which the Landlord sought to reverse a credit which had been made in 2011 in respect of service charges which had previously been demanded and paid. This related to three charges:

   (i) Cleaning on the Communal hallways for the years 2004/11: Total - £5,889.75; Applicant's share - £826.33;

   (ii) Refurbishment of communal hallways: Total - £20,415.55; Applicant's share - £2,864.30;

   (iii) A 10% management charge on these sums: Total - £2,630.53; Applicant's share - £369.06.

   The total sum for which the tenant is liable is £4,059.69.

2. On 26 August, the Tribunal gave Directions. Pursuant to these Directions, both parties have served their Bundles of Documents with the material upon which they seek to rely. In this decision, "App.___" refers to the relevant page number in the Applicant's Bundle and "Resp.____" to the Respondent's Bundle.

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

The Hearing

4. Mr Chesneau ("the Tenant") appeared and was represented by Ms Linda Reynolds of Leaseholders Services Ltd. The Respondent ("the Landlord") was represented by Mr John Boorman who was accompanied by Mr Deryck Prangnell and Mr John Rudd. All three are directors of the Landlord Company.

The Background

5. The Chestnuts is a Victorian house which was converted into seven flats in 1955. The leases grant terms of 999 years commencing on 24 June

1955. The Tenant is the lessee of Flat 1 which is on the ground floor and has its own entrance. Flats 2 to 5 have their own entrance and common parts. Flats 6 and 7 have their own entrance and are in a converted stable annexe.

6. Six additional flats were later constructed in the adjoining converted stable annexe. This development is known as Chestnut Royal and is not relevant to the issues that I am required to determine.

7. In 2000, the Tenant acquired his interest in Flat 1. He does not occupy his flat. His lease is dated 4 February 1955. By Clause 2(iv) of his lease, the Tenant covenants:

> "At all times during the said term to pay and contribute a rateable proportion (calculated as aforesaid) of the reasonable expenses of making repairing maintaining supporting rebuilding and cleansing all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters main walls roof party walls party structures and fences easements and appurtenances belonging to or used or capable of being used by the Tenant in common with the Lessor or the Tenants or occupiers of the premises of which the demised premises form part and of keeping the drive and footpaths in good repair and condition the lawns properly mown trimmed and rolled the flower beds shrubberies and trees in good order and condition and properly tended manured and cultivated and in replacing any trees shrubs or bushes which may perish together with a sum amounting to ten per cent of such expenses"

8. It is common ground that the Tenant's contribution is 14.03% of the service charge. The issue is rather whether the Landlord is entitled to pass on the costs of repairing and maintaining the common parts which are enjoyed by the tenants of Flats 2 to 5.

9. In 2004, the tenants exercised their right to collective enfranchisement. I was told that there had previously been a history of neglect and that the enfranchisement followed protracted and costly legal action. The Landlord is a company which is owned by 10 of the 13 tenants. Five of the shareholders are directors. The Tenant is not a shareholder. None of the directors receive any remuneration for carrying out their duties on behalf of the Landlord Company. They have discovered that the leases are not entirely satisfactory; for example, the service charge can only be collected in arrears. The shareholders have to bear the costs of any expenditure which cannot be passed on to the tenants through the service charge account.

10. In 2004, the Landlord refurbished the communal hallways at a cost of £20,415.55. The works included the following: carpeting; renewal of electrical installations; installation of smoke alarms; re-decoration and

re-plastering. These works were subject to the appropriate Section 20 consultation procedures. Three estimates were obtained. On 1 October 2004, the Landlord demanded an advance service charge. On 9 November 2004, the Tenant paid this without protest. In May 2005, the works were completed. No tenant sought to challenge the works at this time, whether in respect of the consultation process, the reasonableness of the advance service charge that was demanded or the final reconciliation that was made.

11. In 2010, the Landlord brought an application against the tenant of Flat 7 for unpaid service charges (Case No. LON/00AF/LIS/2010/0018). On 7 March 2011, at an initial hearing, a Tribunal indicated that the Landlord had not been operating the service charge accounts in accordance with the terms of the tenant's lease. There were a number of professional charges that the Landlord was not allowed to recover. However, it was entitled to charge a management charge of 10%. The Tribunal adjourned the case until June.

12. Rather than return to the Tribunal to determine the issues in dispute, the Landlord decided to recompute the service charge accounts in the light of the indications that had been given. On 22 August 2011, the Landlord received advice from the Leasehold Advisory Service (at Resp.1) who considered the lease for Flat 5 and suggested that the expenditure relating to the repair and maintenance of "the entrance halls and approaches thereto and the staircase and landing hatched mauve (on the lease plan)" (under Clause 3(iv) should be treated separately to that relating to the repair and maintenance of "passageways pathways" (under Clause 3(iii)). I note that the Leasehold Advisory Service was only provided with the lease to Flat 5. Clause 3(iv) does not appear in the lease for Flat 1.

13. In September 2011, the Landlord presented all the tenants with revised service charge demands. This resulted in 12 of the 13 tenants receiving credits. The Tenant received a credit of £4,059.69, the sum referred to in [1] above.

14. In 2013, the Tenant made his first application to the Tribunal in LON/001F/LSC/2013/0067. The Case was heard on 7 May 2013 and the decision was issued on 10 June 2013. The Tenant sought a determination of his liability to pay service charges for the service charge years 2005/6 to 2011/2. Ms Reynolds represented the Tenant.

15. It is important to identify what issues were determined by this Tribunal and the grounds for their decision. First, the Tenant was successful in respect of the sums for which the Landlord had sought to make him liable in respect of two sets of linked works as the Landlord had failed to comply with the Section 20 Consultation requirements. As a consequence, the Tenant's liability was reduced to £250 in respect of each set and the 10% management charge was also reduced in line with

this. Secondly, the Tribunal found that the Tenant was not obliged to contribute to the cost of the entry phone system (£89.84 in 2006/7 and £14.52 for 2009/10). The Tribunal was satisfied that this was not a service "belonging to or used or capable of being used by the Tenant in common with the Lessor or the Tenants or occupiers of the premises" and therefore fell outside the scope of Clause 2(iv). Thirdly, the Tribunal disallowed the landlords claim for £126.51 for 2007/9 which was a "prior year adjustment for blocked hopper" as the Landlord had failed to make the demand within the relevant period of 18 months specified by Section 20B.

16. The Tribunal found that all the other sums claimed for the service charge account years 2005/6 to 2011/2 were payable. Ms Reynolds argued that the Tenant should not be liable for a number of these items as they were for the benefit of the tenants who occupied Flats 2 to 5 and enjoyed the common parts serving these flats. The Tenant did not use the main door, or the entrance-way and hallways inside the main building and should therefore not be liable for the repair and maintenance of the entrance door or the roof area over the porch which served Flats 2 to 5. Neither should the tenant be liable for health and safety signs which were put up in the communal hallways.

17. The Tribunal rejected these arguments. The reasons are set out at [30] to [32]. The Tribunal highlighted the following points:

(i) The Tribunal did not accept that a tenant is exempt from contributing towards a service charge simply because it could be argued that the tenant does not use the item or service in question. It was satisfied that a landlord is entitled to manage the building as a whole and charge each tenant its percentage service charge contribution.

(ii) The Tribunal had specific regard to Clause 2(iv) and the phrase: "used or capable of being used by the Tenant in common with the Lessor or the Tenants or occupiers of the premises of which the demised premises form part". Whilst the Tenant had his separate entrance, the building should be considered as a whole, and all tenants had an interest that this should be maintained. Clear wording in the lease would be required to exempt the tenant from contributing towards the maintenance of certain parts of the building but not others.

(iii) At [33], the Tribunal addresses the tenant's liability in respect of the maintenance of the common parts: "It is true that the Applicant does not need to use these areas in order to access the Property, but in the Tribunal's view they are part of the structure of the building and therefore the Respondent is entitled to treat their maintenance as part of the maintenance of the building as a whole".

18. Neither party appealed this decision. The Landlord was obliged to revisit the service accounts to give effect to this decision. The Landlord

further revisited its decision of September 2011 to award the credit of £4,059.69. It took the view that the decision of the Tribunal overrode the advice that had been given by the Leasehold Advisory Service.

19. On 24 June 2013, the Landlord issued the revised demand reversing the credit that had been applied in 2011. The Demand is at App.21. In practice, no further sum was payable by the tenant as a credit of £5,356.12 was carried forward and only £4,059.69 was payable. On 25 June 2013, the Tenant remained in credit in the reduced sum of £791.16.

20. The issue that this Tribunal is required to determine is whether the Landlord was entitled to reverse the credit that had been made in 2011.

The Submissions of the Parties

21. Ms Reynolds argues that the Landlord was not entitled to issue the revised demand for three reasons:

(i) The demand falls foul of Section 20B of the Act as the service charge was incurred more than 18 months before a demand for payment of the service charge was served on the Tenant.

(ii) In the alternative, the sums are not payable as they relate to services for the benefit of the tenants of Flats 2 to 5, and fall outside the scope of the service charge that the Tenant is obliged to pay under the terms of this lease. In his application form, the Tenant suggests that this was "determined in the previous case" (App.9). This is not correct. At the hearing, Ms Reynolds rather relied upon the advice proffered by the Leasehold Advisory Service in 2011. Ms Reynolds added that this advice had been confirmed by a barrister at Tanfield Chambers. She invited the Tribunal to construe the lease in a different way than that adopted by the Tribunal in the light of the terms of the lease for Flat 5. This was not before the previous Tribunal. The Tenant stated that this had not been available to him.

(iii) In the alternative, the sum of £2,864.30 is not payable as there were defects in the consultation process and the proposed works were outside the scope of the lease.

22. Ms Reynolds relies on the following clauses in the lease for Flat 5 (a flat on the top floor), which are not to be found in the lease for Flat 1:

(i) Clause 1: the additional words "TOGTHER ALSO with the right (in common with the Lessor and the tenants of the other flats of the Chestnuts and all others having the like right or similar right) to use for the purpose of access to and egress from the demised premises the

entrance halls staircases and landings coloured mauve on the said plan of The Chestnuts aforesaid"

(ii) Clause 1: the additional words: "AND ALSO YIELDING AND PAYING a rateable proportion (calculated as aforesaid) of such reasonable sums as the Lessor may from time to time expend in the lighting of the said entrance halls and the approaches thereto and the staircases and landings coloured mauve on the said plan"

(iii) Clause 3 (the Lessor's covenants): (iv) At all times during the said term to keep the entrance halls and approaches thereto and the staircases and coloured mauve on the said plan properly cleaned and lighted and in good repair and condition".

23. Mr Boorman makes the following submissions in response:

(i) The "reverse of credit" was no more than an accounting adjustment, so Section 20B has no relevance to the case.

(ii) The 2013 Tribunal decision established that all tenants were responsible for their part of the service charge relating to the building as a whole.

(iii) The works executed in 2004 were subject to the appropriate consultation procedures and the relevant costs were both payable and reasonable.

The Tribunal's Decision

24. The Tribunal is satisfied that Section 20B has no relevance to this case. The costs were incurred in 2005. On 1 October 2004, the Landlord demanded an advance service charge. On 9 November 2004, the Tenant paid this without protest. In May 2005, the works were completed. No tenant sought to challenge the works at this time, whether as to the consultation process, the reasonableness of the advance service charge that was demanded or the final reconciliation that was made. Mr Boorman referred us to the provisions of Section 19(2) of the Act.

25. In September 2011, the Landlord presented the tenants with revised service charge demands, based on advice from the Leasehold Advisory Service. In June 2013, the Landlord reviewed this advice in the light of the determination made by a Tribunal on 10 June 2013 in LON/001F/LSC/2013/0067. The Landlord was obliged to revisit the service charge account in the light of this decision. I am satisfied that in June 2013, the Landlord did no more that make an accounting adjustment as to how the service charges should be apportioned between the tenants.

26. This tribunal is not willing to revisit the manner in which the Tribunal construed the terms of the Tenant's lease in LON/001F/LSC/2013/0067. That Tribunal determined that the Tenant is liable to contribute to the costs of repairing and maintaining the common parts from which the tenants of Flats 2 to 5 primarily benefit. This decision was properly open to the Tribunal on the basis of the evidence that was adduced before them. It is a decision that neither party has sought to appeal.

27. It is apparent that the leases in respect of the seven Flats at the Chestnuts are drafted in different terms. There are a number of significantly differences between the leases for Flat 5 and Flat 1. It is possible that the leases for Flats 2 to 5 are in identical terms. However, there is evidence before me to suggest that the leases may differ depending upon whether the flat is on the lower or the top floor. It is probable that the terms of the leases for Flats 6 and 7 are again different as they have their own entrance and are in the converted stable annexe. It would seem that the drafting of the leases is far from satisfactory. If a Tribunal is to revisit the service charge regime at the Chestnuts, it would need to consider the terms of all the leases. It would further be desirable for all the tenants to be parties to any such determination. When a Tribunal rewrites how service charges are to be apportioned between different lessees, there are inevitably winners and losers. It is desirable that all parties should be heard. Indeed, it may be that more fundamental variations to the leases are required to ensure that the respective rights and obligations of the landlord and the individual tenants are set out with greater clarity.

28. There must be finality to litigation. The Tenant is asking me to revisit the decision of the previous tribunal in the light of evidence that was not before that Tribunal. Even the evidence before me is incomplete. I am not willing to revisit that earlier decision.

29. I am satisfied that the Tenant is liable for the service charge costs of cleaning the communal hallway and the refurbishment of the communal hallways. I have regard to Clause 2(iv) and the phrase: "used or capable of being used by the Tenant in common with the Lessor or the Tenants or occupiers of the premises of which the demised premises form part". Whilst the Tenant has his separate entrance, the building should be considered as a whole, and all tenants have an interest in this being maintained.

30. Finally, Ms Reynolds asks me to disallow the costs of refurbishing the communal hallways in 2005. In the application form (at App.9), reference is made to defects in the consultation process. No evidence was adduced to support this suggestion.

31. Ms Reynolds further sought to argue that the Landlord would need to establish that the works were necessary to repair or maintain the

structure of the building. The Landlord stated that the floor tiles were replaced because they had asbestos. Ms Reynolds sought to argue that whilst the replacement of the tiles would have been part of the structure, new carpeting was not. Further, neither fire alarms nor door mats were structural.

32. I reject these arguments. All these works were subject to statutory consultation in 2004. The Landlord afforded all the tenants adequate opportunity to comment on the scope of the works that were proposed. An interim service charge was demanded and paid, without protest. I am further satisfied that all the works fell within the scope of Clause 2(iv) of the Tenant's lease.

Rule 13(1) Application

33. Ms Reynolds made an application for costs under paragraph 10, Schedule 12 of the Commonhold and Leasehold Reform Act 2002. Since 1 July 2013, this has been replaced by Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. I treat this as an application under Rule 13(1).

34. Ms Reynolds complains that the Landlord has acted unreasonably in the conduct of these proceedings. It has refused to mediate; refused to negotiate and forced the Applicant to take expensive legal advice. The Tenant claims £1,650 in respect of the advice sought from a barrister at Tanfield Chambers and a further £500 + VAT for the cost of the application.

35. Rule 13 of the Tribunal Procedure Rules provides (emphasis added):

> "(1) The Tribunal may make an order in respect of costs only:
>
> .....
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ...(ii) a leasehold case ...."

36. The Tribunal have found in favour of the Landlord. I am satisfied that it has acted reasonably in defending this application. It has complied with the directions given by the Tribunal. It has set out its case with clarity. The directors have done their best to resolve a difficult situation. They are not lawyers.

37. Even had the Tenant succeeded in his application, he would have had great difficulty in persuading me that an order should be made. I have regard to the decision in *Ridehalgh v Horsefield [1994] Ch 205*. This Tribunal is satisfied that an order under Rule 13(1) is only justified if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid. This tribunal remains essentially a costs-free

jurisdiction where no party should not be deterred from using the jurisdiction for fear of having to pay the other party's costs should she or he fail in their application. Were the tribunal to adopt an unduly punitive approach to any breach, it could have a chilling effect upon access to justice. Parties with good claims could be deterred from bringing them before this tribunal.

Application under s.20C and Refund of Fees

38. At the end of the hearing, the Tenant made an application for a refund of the fees that he had paid in respect of the application and the hearing pursuant to Rule 13(2) of the Tribunal Rules. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not order the Respondent to refund any fees paid by the Applicant.

39. In his application form, the Applicant applied for an order under section 20C of the Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is not just and equitable in the circumstances for such an order to be made.

Judge Robert Latham
18 December 2015

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of Relevant Legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.