10824

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AK/LSC/2015/0041**
Property	:	**Flats 2 and 3, 5 The Rise, London N13 5LF**
Applicants	:	**Mr John Demetriou** **Mrs Georgina Demetriou**
Representative	:	**Harper and Odell, Solicitors**
Respondents	:	**Jonathan Howard Gershinson** **Louisa Jane Brooks** **(Both Acting as Fixed Charge Receivers)**
Representative	:	**LR Solicitors**
Type of Application	:	**Section 27 Landlord and Tenant Act 1985 – to determine service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Richard Shaw FRICS**
Date and venue of Determination	:	**28 May 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**1 June 2015**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The amount of the service charges to which the applicants must contribute in respect of the years ending 31 May 2012, 2013 and 2014 is that set out in columns headed 'B' in the attached schedule marked Appendix 1; and

   1.2 An order shall be made, and is hereby made, pursuant to section 20C Landlord and Tenant Act 1985 (the Act) to the effect that none of the costs incurred or to be incurred by the respondents in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the applicants to the respondents.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural and factual background

3. The applicants are now the lessees of flats numbered 2 and 3 at a property known as 5 The Rise, London N13 5LF .

4. Evidently 5 The Rise was originally constructed as a house and was later adapted to create three self-contained flats. In their statement of case the applicants say that this conversion was carried out in 2010/11 but given the long leases of flats 2 and 3 were granted in in late 2008/early 2009 we infer the conversion works were carried prior to the grant of those leases.

5. Evidently the original landlord/developer Mazhar Hussain and Nasreen Hussain got into financial difficulties and on 9 February 2012 National Westminster Bank Plc (the bank) appointed the respondents to be fixed charge receivers of the freehold interest of 5 The Rise together with a number of other properties charged by the Hussains [94]. It may be noted that according to Schedule 1 attached to the deed of appointment the charge in respect of 5 The Rise was dated 22 June 2006.

6. The respondents are partners with Allsop LLP. Following their appointment, they appointed Allsop Residential Investment Management Limited (ARIM) of 33 Park Place Leeds, to be their managing agents. ARIM's letterhead states that it is a wholly owned subsidiary of Allsop LLP.

7. Issues have arisen between the parties as to the amount of service charges incurred by the respondents and demanded of the applicants in respect of the years ending 31 May 2012, 2013 and 2014.

8. The applicants made an application to the tribunal pursuant to section 27A of the Act [1]. It is dated 26 January 2015. It includes a related application pursuant to section 20C of the Act concerning any costs which the respondents might incur in connection with these proceedings.

9. A case management conference was held on 19 February 2015 at which both parties were represented by solicitors. Directions were drawn up in consultation with those attending [13]. Those directions gave notice to the parties that the applications would be determined without an oral hearing unless within 28 days either party requested an oral hearing. The tribunal did not receive a request for such a hearing from either party.

10. The tribunal has received a bundle of material documents submitted pursuant to direction 11. Broadly speaking it contains:

The application form	[1]
The directions	[13]
Scott Schedule	[19]
Applicants' statement of case	[27]
Respondents' statement of case	[70]
Applicants' reply	[140]
Accounts for the three years in issue	[171]
Copy lease of flat 3	[188]
Copy lease of flat 2	[220]

11. The decisions of the tribunal have been arrived on the basis of the representations made and documents submitted by the parties as detailed above.

The leases and the service charge regime

12. The leases are in fairly modern conventional form and are broadly in common form. Each lease grants a term of 110 years commencing on its date at a ground rent commencing at £250 per year and increasing during the term. Each lease reserves an insurance rent and, separately makes provision for the payment of service charges which are reserved as rent. Each lease provides that the service charge contribution is one third of the costs incurred.

13. The insurance arrangements are set out in clause 5, for an example see [206]. The landlord is obliged to insure the building against the risks specified in such reputable insurance office as the landlord may from time to time decide. The insurance rent is payable on demand, and it may be demanded in advance of the renewal date, but not more than one month in advance, see clause 5.5 [208]. Despite the provisions of this clause the respondents' managing agents appear to have treated the cost of insurance as if it were a cost of the provision of services

within the service charge regime and it has been included in the annual service charge accounts, see the accounts at [174, 175 and 176].

14. The service charge regime is set out in Schedules 4 and 5 of the lease, see at example at [214]. It may be summarised in the following way. The service charge year is the period 1 June to the following 31 May. A sum on account of the service charge is a payable on 1 June in each year. As soon as practicable after the end of each year a certificate is to be prepared by and signed by the landlord or its managing agents or auditors and served on the tenant. The certificate is to set out:

    1. The amount of the total service year for the year;
    2. The amount of the interim service charge paid on account by the tenant, together with any surplus carried forward from a prior year; and
    3. The amount of the service charge payable (one third) and the amount of any balancing debit or credit as the case may be.

    The amount of any balancing debit is payable within 28 days of the provision of the certificate. If there is a balancing credit the amount of it is credited to the tenant's account and carried forward to the next financial period.

The service charges in dispute

15. Evidently 5 The Rise is not a complex development to manage. The services provided appear to be limited to the buildings insurance, common parts lighting, fire alarm, emergency lighting, repairs and redecorations as and when may be required and the collections of service charges on account and the provision of year end certificates. It does not appear that the managing agent has organised and supervised such matters as common parts cleaning, window cleaning, grounds maintenance, and servicing of and repairs to mechanical plant and equipment such as lifts, electronic gated security or similar kit.

16. It appears the modest common parts comprise a small lobby area behind the front door, stairway leading to the first floor and a smaller lobby or landing area leading to the front door of the upper flat.

17. Appendix 1 to this decision sets out in the columns marked 'A' the amount of insurance costs and other service charges incurred by and claimed by the respondents in each of the three years in issue.

    In column 'B' we have inserted the sum which we find is the top end of the bracket that could be considered reasonable and we determine that the applicants should not pay a sum greater than their share of the sum we have specified in the columns 'B'.

18. It will be seen the range of services specified in Appendix 1 is few. Given that some items and issues span all three years it is convenient to take them on a subject by subject basis.

Insurance

19. The cost of insurance is a service charge as defined in section 18 of the Act and although under the terms of the lease it is reserved as an insurance rent and thus not strictly part of the service charge regime as set out, it is sensible, appropriate and within out jurisdiction that we determine the amount payable in respect of buildings insurance.

20. The year 2012 is a part year. On an annualised basis the cost of insurance for the whole year would have been in the order of £850. In 2013 and 2014 the annual cost was £943 and £973 respectively. Given that there are three flats in the development the unit costs claimed are in the order of £284, £315 and £325 for the respective years. The insurance has been placed with Allianz Insurance Plc a major and well known insurer.

21. The applicants have challenged the amounts incurred. They have provided quotes prepared in 2015 for future business which average £720, or £240 per unit. There are some issues between the parties as to whether the quotes are on a like for like basis.

22. On this issue we prefer the submissions made on behalf of the respondents. The lease obliges the landlord to insure with a reputable insurance office and entitles the landlord to decide from time to time with whom to insure. The landlord is not obliged to search out the least expensive or to shop around. As long as the chosen insurer is reputable and the amount of the premium within a broadly competitive range the landlord is free to place the business where he reasonably considers it appropriate to do so.

23. The respondents are fixed charge receivers acting for a major bank. Allianz is a major and well respected insurer in the property market. We find it was not unreasonable for the respondents to place the business with Allianz. We are reinforced in this view by the amount of the unit costs incurred. In the experience of the members of the tribunal they are well within the bracket of what may be considered reasonable for Greater London. The unit costs incurred are not out of step with what is seen regularly.

24. We are conscious that cost of insurance is often a difficult cost for a tenant to challenge. It is usually impossible to obtain expert evidence of what premiums might have been sought by other insurers in prior years. The insurance market is volatile and capricious, the more so with portfolio insurance. Insurers can quite suddenly decide not to write a certain type of business even though they may have been writing that business for some years and then a few years later suddenly they decide to return to that market. Further, in the experience of members of the tribunal the portfolio market is quite different from what might be termed the domestic market or one off properties. In addition, as with quotes with all quotes for new business regard has to be had to any discount that might have been applied to try and win new business and

whether any such discount might continue to be available on any subsequent renewal.

25. For these reasons we find that the insurance costs were reasonably incurred and are reasonable in amount. We have however adjusted the amount claimed for 2014 to £973.77 which is the actual amount specified on the certificate at [106]. It is not clear to us on what proper basis the respondents can recover through the service charge the sum of £1,844.98 as claimed.

Management fees

26. We find the sums claimed to excessive and so out of proportion and out of line with the market for such services in Greater London that they are not reasonable in amount. We have adjusted the amounts to a reasonable sum for the years 2012 and 2013 and the sum of £900 which the applicants proposed for 2014. We find that such sums are much more in line with what the members of the tribunal regularly come across in their work with the tribunal for similar such developments in Greater London

27. Whilst we can appreciate the position of the respondents they have chosen to appoint as managing agents a firm with which they have a business connection and which is based in Leeds. There is no evidence presented that the respondents carried out a market test or competitive appraisal before appointing ARIM to manage the subject property.

28. The respondents' submissions for appointing ARIM are unconvincing. Whilst we can understand that the respondents may prefer some uniformity in the buying of goods and services and whilst we can see that it may often be sensible to maintain a list of preferred tried and trusted suppliers and contractors that does not give them carte blanche to instruct managing agents at fees which are so high for the management of a relatively small and unsophisticated development such as 5 The Rise.

29. We infer that the respondents and the bank which appointed them is concerned with a good number of properties within the Greater London area. We find that with a little effort it would prove possible for the respondents to identify a reputable managing agent within Greater London, acceptable to the bank and whose unit charges would be much less than those agreed with ARIM. ARIM is said to have offices in London which may well have been placed to give some guidance.

General

30. The respondents have conceded that the cost of £332 in the 2014 accounts was an error and that the actual cost was nil. We have therefor deleted that sum from column 'B' for 2014.

Common parts electricity

31. As regards 2013 there was no objection made to the sum claimed as such. In paragraph 11 of the applicants' statement of case stated they

had no record of receiving a compliant demand and drew attention to section 153 Commonhold and Leasehold Reform Act 2002. That section imposed a new section 21B into the Act.

32. The respondents answered that allegation in their statement of case in answer and that was not challenged by the applicants in their reply.

33. We thus find that valid and compliant demands were made and that the applicants are liable to contribute to the expense.

34. As regards 2014 the challenge was that supporting invoices had not been provided. In answer the respondent has explained how the sum has been arrived at and that has not been challenged by the applicants in their reply.

35. We thus find that a valid and compliant demand was made and that the applicants are liable to contribute to the expense.

Electric, Fire and Asbestos

36. It is convenient to take these three items together.

37. The make-up of the sums claimed is as follows:

2013		
Electrical		£414
Fire:		
Fire alarm inspection	£240	
General risk assessment and fire risk assessment	£354	
Abortive site visit fee	£ 96	£690
Asbestos survey		£450
2014		
Electrical (Installation of 2 emergency lights)		£432
Fire:		
Fire alarm inspection		£246

38. The fire alarm inspections were carried out by a firm, DTEC Alarms and the other inspections/works were carried out by Veritas Management. Both are said to be national firms and were engaged at the respondents' behest because they and the bank prefer to use tried and trusted firms which can offer a nationwide service to a high standard across the portfolio under management. Although the respondents made several references to 'market rate' no evidence to support those assertions was provided. Further no evidence was provided to show that by placing business with a contractor on a nationwide basis gave it an economy of scale.

39. In general terms the experience of the members of the tribunal is the sums charged for the services provided are extraordinarily high for the Greater London area and as such they are unreasonable in amount. We are reinforced in this view by some of the estimates or quotes submitted by the applicants, many if which strike a chord with the tribunal.

40. If the respondents and the bank prefer to use a nationwide contractor because it is more convenient for them to do so, that is fine and a luxury they are entitled to if they are bearing the cost themselves. That is not the case here. Here the respondents are providing services and administering service charges held by them as trust funds. They are not expending their own monies. The respondents must have regard to the relevant provisions of the Act and they must also have regard to the interests of the lessees who are the beneficiaries of the trust.

41. ARIM are said to be experienced managing agents with offices in Brighton, London, Leeds and Glasgow. In those circumstances it seems to us reasonable to expect them to make suitable enquiries of potential contractors and suppliers of services within the Greater London area and to draw up a short list of reputable and reliable providers who can provide local services at a reasonable and competitive cost. We accept the respondents' general submission that they are not obliged to search out and find the cheapest contractor or supplier but they do have the obligation to ensure that costs are not incurred which are unreasonable in amount.

42. We have therefore made adjustments to some of the sums claimed to reflect what we, drawing on our accumulated experience and expertise, consider to be reasonable for the services provided at 5 The Rise.

43. The 2013 electrical charge of £414 refers to a NICEIC test carried out on 27 September 2012. The supporting invoice is at [129]. It is confusing. On the one hand it states plainly that it is made up as to:

Labour	£ 69.00
Materials	£276.00
VAT	£ 69.00
	£414.00

On the other hand it suggests that the test on 27.09.2012 cost £250 + VAT and that there was second attendance on site to fit a missing blank to the board at a cost of £95 + VAT. Those two costs + VAT add up to £414.00.

44. The tribunal accepts that given the circumstances in which the respondents took on the responsibility to manage the development it was not unreasonable to commission a NICEIC test of the emergency lighting to the ground and first floor of the common areas and the domestic smoke alarm.

45. In paragraph 6 of their statement of case [83] the respondents assert that the two visits were made for the reasons mentioned in paragraph 43 above. They also rather unconvincingly seek to explain the confusion and misinformation in the Veritas invoice as to the breakdown of labour, materials and VAT.

46. We have adjusted the amount payable to £200 which, in our experience is more than reasonable to carry out a modest NICEIC inspection and test, and to rectify a minor fault by replacing a missing blank. It is expected that a competent electrical contractor would carry a reasonable stock of basic kit so as to avoid the need to make a second visit.

47. The fire alarm inspection was carried out by DTEC in September 2012, at a cost of £240 and the General Risk Assessment and a Fire Risk Assessment was carried out by Veritas in April 2013 at a cost of £354. The respondents say that both were required by The Regulatory Reform (Fire Safety) Order 2005. We accept that. But the fire alarm is a modest domestic smoke detector. We find that an effective property manager would engage one contractor to carry out both tests. We consider it unreasonable to incur the cost of two separate contractors being engaged. Veritas were on site twice in late September/early October 2012 carrying out a NICEIC test and surely they could have carried out a smoke detector test and a fire risk assessment and general risk assessment on one of those occasions. As noted earlier the common parts of this development are very small and modest.

48. We have not allowed the cost of £96 for an abortive site visit because we find it was not reasonably incurred. Evidently the charge was made by Veritas in connection with a visit to carry out the general risk assessment and the fire risk assessment. There is a conflict of assertions by the parties as to the circumstances. We prefer the submissions of the applicants on this point which strike a chord with the members of the tribunal. Also we bear in mind that responsibility to provide the respondents' contractors with access to the common parts rests with the respondents and we find they should bear the cost if those arrangements fail. Further if the proposed assessment had been carried out when Veritas were already on site there would not have been an abortive visit.

49. For the reasons set out above we have adjusted the 2013 claim of £690 for Fire down to £345.

50. We have disallowed the asbestos survey fee of £450. We find that the fee was not reasonably incurred. Further it was not reasonable in amount. All that the respondents say about the fee was that it was incurred pursuant to The Control of Asbestos Regulations 2012 SI 2012/632 which imposes numerous duties on the respondents as regards the subject property. They do not say which particular regulation(s) they had in mind.

51. Whilst any building built prior to 2000 can contain asbestos the subject building was adapted a few years after this date and we infer it must have complied with the regulations in force at that time. Asbestos only becomes a problem once it is disturbed. It is the understanding of the tribunal that an asbestos survey is only required where opening up or other works to the property are contemplated and which might give rise to a risk of exposure to asbestos. It would not appear that any such works were contemplated and/or carried out in 2013 or 2014. We have been given no evidence that any part of the building was opened up to check for asbestos and no expense for such repair work has been suggested.

52. We thus find that it was unreasonable to incur the cost of an asbestos survey.

53. The Electrical cost of £432 in 2014 relates to the installation of two emergency lights. The applicants assert that they are not obliged to contribute to the cost and rely upon clause 7.3 of the lease. That clause concerns the imposition of obligations on the landlord. It does not refer to or limit the right of a landlord to provide additional services where appropriate or where it is required by statute to do so.

54. In their statement of case the respondents rightly draw attention to the definition of Service Charge as set out in the lease and, in particular to 1.31.6 and 1.31.7.

55. We are satisfied that it was reasonable for the respondents to incur a reasonable cost for the installation of emergency lighting. However, we are far from satisfied that £432 was a reasonable cost. We have adjusted the cost to £165 because we consider that no greater sum than £165 would be reasonable. This figure accords with the experience and expertise of the members of the tribunal. We are reinforced in this view by the estimate produced by the applicants.

56. The cost of the fire alarm test in 2014 is claimed at £246. We have not been provided with a copy of the supporting invoice. For reasons explained earlier we find that it is reasonable to incur the cost of such a test, but we find that £246 is wholly unreasonable in amount. We have adjusted the cost to £130 because we consider that no greater sum than £130 would be reasonable.

The section 20C application

57. It is not immediately clear that the terms of the lease enable the respondents to recover through the service charge costs incurred by them in connection with these proceedings. Of course, if the lease does not clearly entitle them to do so they may not do so.

58. The respondents have not filed with the tribunal any representations opposing the applicants' application for an order under section 20C of the Act.

59. We have approached the application by asking the question: If, as a matter of contract, the lease enables the landlord to recover through the service charge costs of defending tribunal proceedings, would it be just and equitable to deprive them of all or some of those costs by making an order pursuant to section 20C of the Act?

60. We consider the answer to that question to be: Yes. The applicants made an application to the tribunal for the determination of most of the service charges claimed by the respondents. Save for one exception, General £332 claimed in 2014 which was conceded after the issue of the application because it had been included in error the respondents took issue with the applicants on every challenge raised.

61. In broad terms the applicants have succeeded on many, but not all, of the challenges they have made. Overall it may be said that the applicants won their case.

62. Both parties engaged solicitors to assist them present their respective cases. Thus both parties have incurred costs. The respondents are professional persons, the applicants are not. We consider that in these circumstances justice is best served if each party takes responsibility for its own costs; that is to say costs shall lie where they fall. For these reasons we have made an order pursuant to section 20C of the Act.

General points

63. Before concluding this decision we make a couple of points. In their statement of case the applicants have asserted that the respondents have failed to arrange the cleaning of the common parts and have failed promptly to attend to matters of repair of the property for which they are responsible. In consequence the applicants say they have incurred costs and have lost rental income.

64. The applicants may or may not be right in the assertions they have made but they are not matters which we are entitled to take into account in determining the reasonableness of the amount of the service charges claimed. If cleaning were to be charged for but not carried out we could have made an adjustment. But if cleaning is not carried and is not charged for we cannot make an adjustment.

65. The applicants have engaged solicitors and they must seek advice from them on what remedies (if any) they may have if they believe that the respondents have failed to comply with certain of the obligations imposed upon them under the leases and that in consequence they have suffered loss and damage.

Judge John Hewitt
1 June 2015

Expense	Year Ending 31May		2012 A Claimed by R	2012 B Allowed by tribunal	2013 A Claimed by R	2013 B Allowed by tribunal	2014 A Claimed by R	2014 B Allowed by tribunal
Insurance			£ 283.06	£ 283.06	£ 942.17	£ 942.17	£ 1,844.98	£ 973.77
Electrical					£ 414.00	£ 200.00	£ 432.00	£ 165.00
General							£ 332.00	£ -
Common Parts Electricity					£ 190.20	£ 190.20	£ 117.36	£ 117.36
Fire					£ 690.00	£ 354.00	£ 246.00	£ 130.00
Asbestos Survey					£ 450.00	£ -		
Management Fees			£ 291.29	£ 250.00	£ 1,440.00	£ 750.00	£ 1,440.00	£ 900.00
Totals			**£ 574.35**	**£ 533.06**	**£ 4,126.37**	**£ 2,436.37**	**£ 4,412.34**	**£ 2,286.13**