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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LSC/2014/0657**
Property	:	**Various flats at Queens Court, Queens Road, London, E11 1BD**
Applicants	:	**Mr T O'Kane and others**
Representative	:	**Mr T O'Kane**
Respondent	:	**Better Properties Limited**
Representative	:	**Mr M Taylor FRICS**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Mr S Brilliant** **Lady Davies FRICS** **Mrs L Hart**
Date and venue of hearing	:	**7 May 2015** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**13 July 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines the following issues which were before it:

Year ending 25 December 2012

(a) The statutory consultation process was complied with in respect of the proposed major works.

(b) The question as to the reasonableness of the costs of the proposed major works (£176,733.03) is stayed until it is known whether a different programme of works is to take place.

(c) The question as to the reasonableness of Mr Taylor's professional costs of the proposed major works (£8,070.00) is stayed until it is known whether a different programme of works is to take place.

(d) The remaining service charges for the year (£8,486.93) are payable.

Year ending 25 December 2013

(a) The question as to the reasonableness of Mr Taylor's professional costs of the proposed major works (£5,358.14) is stayed until it is known whether a different programme of works is to take place.

(b) The remaining service charges for the year (£7,806.10) are otherwise payable.

Year ending 25 December 2014

The insurance premium of £253.93 per lessee is payable.

The application

1. The Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 25 December 2012, 25 December 2013, and the estimated service charge for the year ending 25 December 2014.

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

The hearing

3. Mr O'Kane appeared in person at the hearing. Mr Rahmin also attended. The Respondent was represented by Mr Taylor, the Respondent's managing agents.

4. The Respondent provided a substantial partially paginated bundle.

The background

5. Queens Court is a development consisting of two purpose built blocks of flats. There are 12 flats altogether in the development. There is a long block to the rear containing nine flats and a smaller block containing three flats.

6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

7. The Applicants holds long leases of their flats. We have seen a copy of the lease of Mr O'Kane's flat dated 3 March 1987 ("the lease"), and understand that the other leases are in similar form.

8. The lease requires the Respondent to provide services, including insurance and exterior repairs (clause 5).

9. The lease requires the lessee to pay a service charge by way of additional rent (clause 3(1)). Each lessee pays 1/12th of the "Annual Service Cost" (clause 3(2)).

10. The service charge year ends each year on 25 December (clause 3 (7)).

11. The Annual Service Cost in each year is defined in clause 3(5). It includes:

    (1) The sums actually expended or liabilities actually incurred by the Respondent in connection with the management and maintenance of Queens Court.

    (2) Sums by way of reasonable provision for anticipated future expenditure in connection with the management and maintenance of Queens Court.

    (3) Under both (1) and (2):

        (a) The Respondents costs' of insurance and exterior repairs (clause 3(5)(a)).

        (b) Fees payable to a surveyor whom the Respondent employs in connection with the management and/or maintenance of Queens Court (clause 3 (5)(c)).

12. The machinery for collection of the service charge is as follows. The lessee must make a payment in advance of £25.00 on 25 March and on 25 September in each year. This is the only payment in advance the Respondent is entitled to receive under the lease. The Respondent is not entitled to demand a monthly payment in advance, nor is it entitled to demand a contribution to a particular cost in advance.

13. The Respondent must at the end of the service charge year take an account of the Annual Service Charge for that year (clause 3 (7)).

14. The Respondent must within 3 months of the end of the service charge year serve on the lessee a notice in writing, stating the amount of the Annual Service Charge and the 1/12th share which the lessee must pay as the service charge (clause 3 (8)). We shall refer to this as the "service charge demand".

15. The lessee must within 21 days after being served with the service charge demand either pay to the Respondent or be entitled to receive from the Respondent the balance by which the service charge either exceeds or falls short of the amount paid in advance, as described in paragraph 12 above.

16. The inability of the Respondent to receive substantial payments in advance means that it has to fund the bulk of its liabilities itself prior to recouping the balance.

17. This is unattractive to the Respondent which would prefer to receive monthly payments of the likely cost of the service charge. It is fair to say that some lessees may prefer this approach as it helps budgeting.

18. The Respondent has taken upon itself to send out monthly demands for payment of the likely cost of the service charge. Some lessees are content to adapt this variation to the machinery set out in the lease. Some of the lessees, including Mr O'Kane, object to this as they are entitled to do.

19. It is hoped that following the hearing that there is a better understanding of the machinery of the lease and of the parties' different perceptions as to when payment should be made.

20. A further ground of misunderstanding and distrust between the parties is the use of the reserve which had been collected. It is clear from clause 3(5) of the lease set out in paragraph 11 (2) above that a reserve can be accumulated. The Respondent is entitled to draw down from that reserve.

21. We do not consider that these differences as to the collection of the service charge or the use of the reserve are material to the principal issues we have to decide, but we mention them because they have featured heavily in the reasoning of Mr O'Kane and form an additional reason why he submits the service charges are not recoverable.

The issues

22. The Applicants were directed on 20 January 2015 to send to the Respondent a schedule in the form attached to the directions setting out by reference to each service charge year any item and the amount they disputed, the reason why the amount was disputed and the amount, if any, which they would pay for that item. The Respondent was directed to respond by 6 March 2015. The parties duly complied with these directions so that the issues between them are clearly delineated, and we are grateful to them for having done this.

23. The principal issues concerning the recoverability of:

    (1) The costs of proposed major works to Queens Court.

    (2) Mr Taylor's professional costs of the proposed major works.

    (3) The current year's insurance premium.

24. It is also suggested that the service charges are not recoverable because they have not been correctly demanded. This is the argument based on the collection machinery referred to in paragraphs 14 – 21 above.

The costs of proposed major works to Queens Court

25. In the year ending 25 December 2012 the Respondent gave notice that it intended to carry out major works of exterior repair to Queens Court. The projected cost is £176,733.03. At the hearing Mr O'Kane accepted there is no challenge to the statutory consultation process. However, he says that the projected cost of the major works is unreasonable in amount due to the Respondent's historic failure to repair the exterior of Queens Court.

26. In a letter dated 4 February 2015 the Tribunal informed Mr O'Kane that it might be able at the hearing to deal with the increased costs of works as a result of any alleged failure to repair. It was considered that the parties should address the issue of historic neglect in that context. Mr O'Kane reminded the Tribunal of the principles established about historic neglect by the Upper Tribunal in Daejan Properties Ltd v Griffin [2014] UKUT 0206 (LC).

27. At the hearing we were told of events which may have overtaken any exploration of this issue. On 10 February 2015 Mr Taylor was able to reveal on behalf of the Respondent that it was intending to apply for planning permission to create two additional flats on the roof of the rear block of Queens Court. If planning permission is granted we were told that this project will be pursued. The statutory consultation process will have to begin again. Much of the work to be done would become the responsibility of the Respondent and the costs to the lessees would fall.

28. It seemed to us at the hearing that there was little to be gained in considering the question of historic neglect when the major works in their present form may never be carried out. Accordingly, we directed that the question as to the

reasonableness of the costs of the proposed major works (£176,733.03) is stayed until it is known whether a different programme of works is to take place. We are using the power to stay in rule 6(3)(m) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Respondent is to inform the Tribunal and Mr O'Kane, through Mr Taylor, as soon as it is known whether or not the new project involving the creation of further flats is to be pursued.

Mr Taylor's professional costs of the proposed major works

29. No money has yet been spent on the proposed major works and no money has yet been demanded in respect of them by way of service charges. But Mr Taylor has carried out professional work in respect of the proposed major works for which he has charged. This includes the preparation of notices required for the statutory consultation process and work on the specifications. Under the lease the Respondent is entitled to recover these costs under the service charge as is set out in paragraph 11(3)(b) above. Mr Taylor has been paid these costs from the reserve accumulated. As we have said, the Respondent is entitled to accumulate a reserve: see paragraphs 11(2) and 20 above.

30. The costs incurred by Mr Taylor in the year ending 25 December 2012 were £8,070.00 (see page 2 of tab 5 of the bundle). The costs incurred by Mr Taylor in the year ending 25 December 2013 were £5,358.14 (see page 43 of tab 5 of the bundle).

31. Mr Taylor's fees are charged at 13% of the costs of the major works. It is our finding that this amount is in accordance with professional practice and is reasonable. We also find that there is no need for a separate statutory consultation process to be held in connection with the payment of these fees. We reject Mr O'Kane's submissions to the contrary on both these matters.

32. Having made these findings in favour of the Respondent, we then decided at the hearing, with some hesitation, that the question as to the reasonableness of these costs should also be stayed until it is known whether a different programme of works is to take place. If a different programme of works is to take place, and the statutory consultation process has to be repeated, it may be necessary to determine whether it was reasonable to have incurred some or all of these costs. We express no view at all at this stage on the merits of such an argument.

The current year's insurance premium

32. The Respondent has insured Queen's Court for the year ending 24 December 2015 with AXA Insurance UK plc. The particulars are at page 12.7 of tab 4/12 of the bundle. The charge to Mr O'Kane, including Insurance Premium Tax, is £266.69. As this is a 1/12th share, the premium amounts to £3,200.28. This includes terrorism insurance.

33. Mr O'Kane has obtained a quotation from Property & Commercial Ltd trading as Deacon. The particulars are at page 12.8 of tab 4/12 of the bundle. The

charge to Mr O'Kane, including Insurance Premium Tax, would be £130.57 as the premium quoted is £1,566.78. This includes terrorism insurance. Mr O'Keefe has produced a comparison table over the last three years between these insurers and has referred us to Havenridge Ltd v Boston Dyers Ltd [1994] 2 EGLR 73 (page XIX of his statement of case at tab 4 the bundle).

34. The Respondent says in its statement of case (tab 5 of the bundle) that this is an alternative quote from one insurance broker. The quote does not provide any details of the policy excesses. The quote was obtained without any details being given of the claims history. The quote is a Block of Flats policy and not a Property Owners policy, so the quotations are not comparable. Reliance is placed on Forcelux Ltd v Sweetman [2001] 2 EGLR 173, permitting a landlord to ensure as part of a portfolio, as has happened here, even if the premium is higher than could be obtained by an owner occupier.

35. On balance, we are not persuaded that the insurance chosen by the Respondent is unreasonable. It appears that the alternative quote was obtained without any details being given of the claims history, we were provided with insufficient details of the cover by Mr O'Kane and there is no notice of the policy excess.

No proper demands

36. The service charge for the year ending 25 December 2012 totals £16,556.93. The breakdown is shown at page 2 of tab 5 of the bundle. We have already dealt with Mr Taylor's professional fees of £8,070.00. The remaining items comprise cleaning, repairs and maintenance, utilities, interest received and management fees. They total £8,486.93.

37. The service charge for the year ending 25 December 2013 totals £13,164.24. The breakdown is shown at page 43 of tab 5 of the bundle. We have already dealt with Mr Taylor's professional fees of £5,358.14. The remaining items comprise cleaning, repairs and maintenance, utilities, accountancy fee, interest received and management fees. They total £7,806.10.

38. Mr O'Kane challenges the recovery of these items on the basis that the Respondent is out of time in demanding them. He relies upon clause 3 (8) of the lease, referred to in paragraph 14 above, which provides that the Respondent must within 3 months of the end of the service charge year serve on the lessee the service charge demand, which is payable within 21 days after service. He says this is a mandatory provision and that if a demand is served after that date it is too late.

39. At our request the Respondent made available the service charge demands relied upon. We were shown them on Mr Taylor's telephone and hard copies were later sent to the Tribunal. On 10 April 2013 Mr Taylor sent a letter to Mr O'Keefe showing that he owed £179.74 for the service charge year ending on 25 December 2012. This letter and accompanying calculation provided all the information required by clause 3(8) and was a valid service charge demand. On the same day a similar letter was sent to Mr Rahman. Does it matter that

they were served on 10 April 2013, rather than by 25 March 2013? In our judgment, it does not. As a matter of contractual interpretation the requirement of serving the service charge demand within 3 months is directory and not mandatory because time is not of the essence.

40. It would appear that in respect of the service charge ending on 25 December 2013, the service charge demand was sent out on 28 July 2014 to Mr Rahman and on 11 August 2014 to Mr O'Kane. For the reasons given above we also hold that these constituted valid service charge demands, which were properly served.

Application under s.20C

41. In the application form the Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not determine it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act.

Name: Simon Brilliant **Date:** 13 July 2015

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate Tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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.